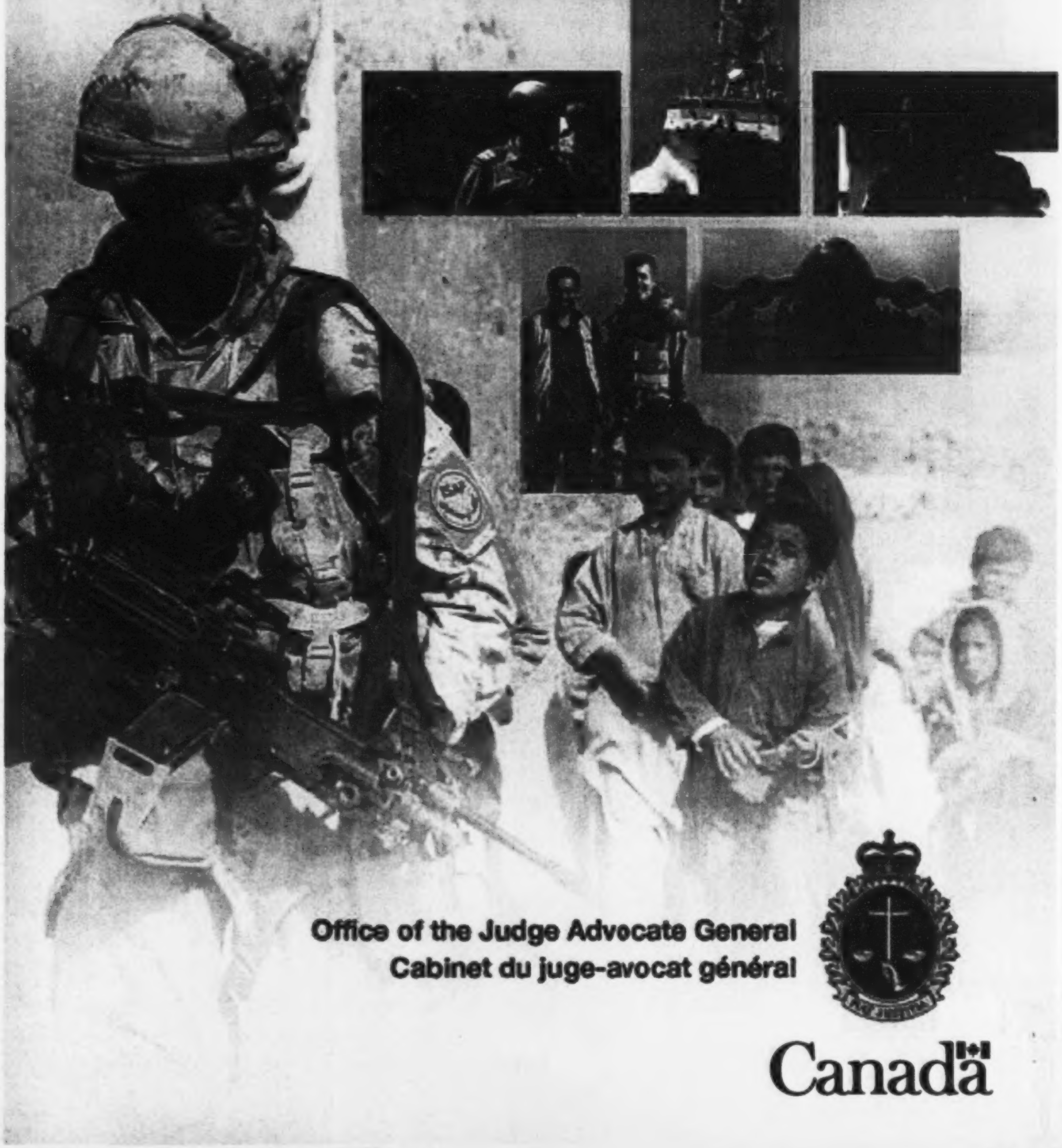
National Defence
Défense nationale

Annual Report

of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces

A review from 1 April 2008 to 31 March 2009



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I am pleased to deliver my third and final annual report to the Minister of National Defence on the administration of military justice in the Canadian Forces (CF) since my appointment as Judge Advocate General (JAG). It is an honour to serve as the Judge Advocate General responsible for the superintendence of the administration of military justice. It is a justice system that contributes directly to the operational effectiveness of the Canadian Forces and thereby the defence of Canada and its interests throughout the world.

As the Supreme Court of Canada has noted, "the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife."[1] Commitment to the rule of law is a fundamental aspect of CF operations both domestically and internationally. In addition, many of the CF operations in failed and failing States are focused on re-establishing the "rule of law". It has also been said that discipline is the soul of an armed force. The operational effectiveness of the Canadian Forces is directly a result of the enforcement of discipline in an effective and efficient manner.[2] For the Canadian Forces this includes a trial system that can be employed within Canada or wherever the CF operates in the world.

The maintenance of an effective discipline system requires regular monitoring to ensure that the needs of the chain of command are balanced with the requirement for CF members to be treated fairly and in accordance with the law. I am pleased to report the continued high level of confidence by the chain of command and other actors in the military justice system. The findings of this report reflect that the military justice system remains uniquely tailored to address the disciplinary needs of the CF while encompassing a fair and just process for all of its members in a manner that complies with the *Canadian Charter of Rights and Freedoms.* In 1982 the *Charter* itself acknowledged the unique constitutional status of military tribunals and the military justice system with its exception to jury trials.[3]

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[1] See Re *Manitoba Language Rights*, [1985] 1 S.C.R. 721at para. 60 [quoting Wade and Phillips, *Constitutional and Administrative Law* (9th ed. 1977), at p. 89].

[2] *Généreux v. R*, [1992] 1 S.C.R. 259.

[3] *Charter of Rights* s. 11(f):

11. Any person charged with an offence has the right

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

The military justice system must continue to evolve to meet the needs of discipline in the 21st Century. The activity within the Office of the Judge Advocate General this reporting period underscores such evolution through legislative, regulatory and policy initiatives that serve to enhance the unique requirements of the CF. These initiatives help ensure the military justice system keeps in step with the changes in the Canadian criminal justice system while remaining fully responsive to the unique needs of military society.

Particular emphasis this reporting period was placed on the response to the Court Martial Appeal Court decision in *R.* v. *Trepanier.*[4] That decision resulted in two major changes to the *National Defence Act* (NDA) through the implementation of Bill C-60.[5] First, the NDA was amended to provide that an accused service member facing trial by court martial can generally select the type of trial (e.g. military judge alone or a military judge and panel members) in a manner that is similar to the civilian criminal justice system. Second, the types of courts martial were reduced from four to two with the abolishment of the Disciplinary Court Martial and Special General Court Martial. These amendments were promulgated during the early portion of the reporting period and have been met with positive results.

Amendments such as those brought forth in Bill C-60 serve to reinforce to the CF and the Canadian public the responsiveness of the military justice system in adapting to changing circumstances in the law. Other broader legislative initiatives based on the 2003 report of Chief Justice Lamer were placed before Parliament. On 7 September 2008 this legislation which largely mirrored its predecessor, Bill C-7, died on the Order Paper with the calling of a federal election. It is anticipated that a successor to Bill C-45 will be introduced in the next reporting period.

It is also important to note that initiatives undertaken to reduce delay are starting to have an effect. For example, the Canadian Military Prosecution Service underwent an external review designed to identify inefficiencies in its operations. The Director of Military Prosecutions has made significant amendments to various prosecution policies including setting strict timelines to complete pre- and post- charge screenings of investigations. In addition, a prosecutor was embedded in the Canadian National Investigation Service to provide legal advice at the investigative stage.

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[4] [2008] C.M.A.J. No. 3.

[5] R.S.C. 1985, c. N-5. Bill C-60: 2nd Sess., 39th Parl., 2008.

This initiative mirrors similar steps being taken by civilian prosecution authorities in Canada.

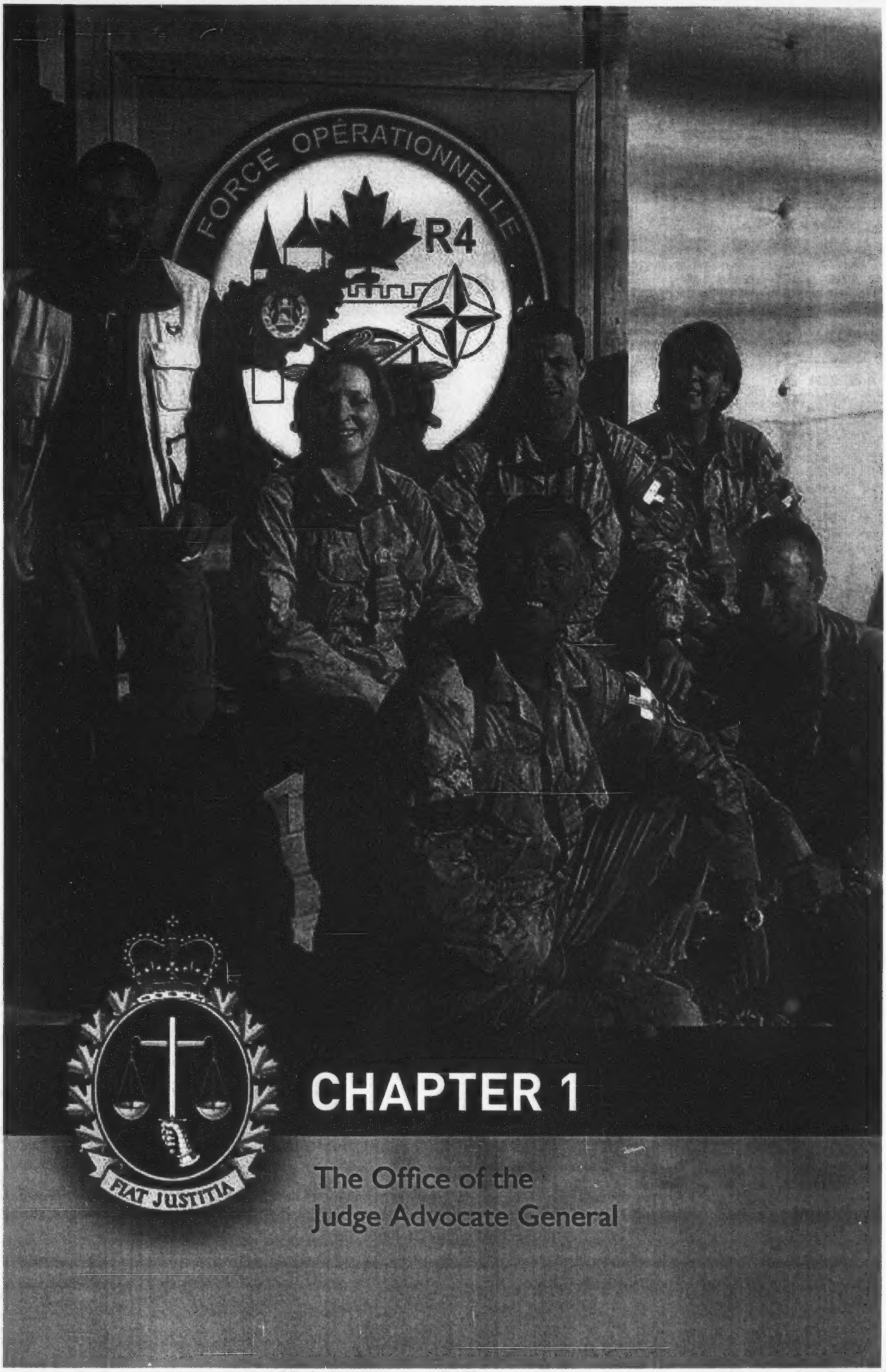
There continues to be general compliance with regulatory requirements in the summary trial process, fair treatment of accused persons and a responsive review process. A review of the statistical data indicates a slight reduction in the number of service tribunals with a total of 1898 summary trials and 65 courts martial during the reporting period. The reduction in the number of summary trials, from 2035 in the previous reporting period, does not appear to suggest any significant trend for the military justice system. Indeed, the number of summary trials held within the reporting period continues to reinforce the importance of this critical tool to the chain of command to enforce discipline in a fair and efficient manner. The number of courts martial decreased from 78 to 65 (a 17% decrease from the previous reporting period). However, the total number of courts martial for this reporting period is slightly above the average number of courts martial over the past five years. The court martial remains an essential tool for the maintenance of discipline designed not only to deal with more serious service offences, but also in appropriate cases to allow an accused to elect a mode of trial that offers a full range of constitutional protections.

One area where there has been a significant change has been the number of disciplinary proceedings involving negligent discharges while on operations. While the overall percentage of summary trials in the CF involving negligent discharges remains significant at 22%, the number of negligent discharge trials in an operational theatre dropped from 69 to 29. This represents a notable drop in percentage for negligent discharges from 37% in 2007-2008 to 19% of operational summary trials. This suggests that the emphasis the CF leadership has placed on weapons handling in training and the deterrent effect of the disciplinary process is having an impact.

I want to close by stating that it has been an honour to have served as Judge Advocate General leading a team of legal officers dedicated to ensure that justice is done in the defence of our nation.

FIAT JUSTITIA

Kenneth W. Watkin, Q.C.
Brigadier-General
Judge Advocate General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CHAPTER 1

The Office of the Judge Advocate General

1.1 The Judge Advocate General (JAG)

The JAG is responsible under the *National Defence Act* (NDA)[1] for the superintendence of the administration of military justice.[2] Related to this responsibility is the JAG's statutory mandate to conduct regular reviews and submit an annual report to the Minister of National Defence (the Minister) on the administration of military justice in the CF.[3] This is the report of the JAG to the Minister for the reporting period of 1 April 2008 to 31 March 2009.

Under the authority of the NDA, the JAG is appointed by the Governor in Council and serves at pleasure for a term not exceeding four years which can be renewed.[4] In addition to his responsibility for the superintendence of the administration of military justice, the JAG's statutory mandate includes his duty as the legal advisor to the Governor General, the Minister, the Department of National Defence (DND) and the CF in all matters pertaining to military law.[5] Although the JAG is responsive to the chain of command for the provision of legal services in the CF, he is responsible to the Minister for the performance of his duties.[6]

The position of the JAG within the CF and DND is illustrated in the organization chart contained at Annex A.

1.2 Office of the JAG

The Office of the JAG supports the JAG in the fulfilment of his duties. The Office of the JAG is constituted as an element of the regular force of the CF. The JAG is designated as an officer having the power and jurisdiction of an officer commanding a command.[7]

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[1] R.S.C. 1985, c. N-5 [NDA].

[2] *Ibid.* at s. 9.2(1).

[3] *Ibid.* at ss. 9.2(2) and 9.3(2).

[4] *Ibid.* at s. 9(2) and 9(3).

[5] "Military law" means: ... all international and domestic law relating to the Canadian Forces, including its governance, administration and activities. Similarly, at section 2 of the *Criminal Code of Canada*, the definition of "military law" includes "all laws, regulations or orders relating to the Canadian Forces".

[6] *Supra* note 1 at s. 9.3(1), and Ministerial Organization Order 96-082 dated 1 August 1996. For a detailed description of the concepts of responsibility, authority and accountability within the CF and DND generally, see the DND publication "Organization and Accountability", 2nd edition, September 1999.

The JAG exercises command over all officers and non-commissioned members (NCMs) posted to an established position within the Office of the JAG.[8] The duties exercised by legal officers posted to a position within the Office of the JAG are determined by or under the authority of the JAG and, with respect to the performance of their duties, those legal officers are not subject to the command of any officer who is not a legal officer.[9] For military matters not related to the performance of their duties, legal officers, including the JAG, are subject to the orders and direction of the CF chain of command.

1.3 Structure of the Office of the JAG

As of 31 March 2009, there were 151 regular force legal officers and 55 reserve force legal officers serving across Canada and abroad. These numbers included legal officers on post-graduate, second language and other academic training, as well as those legal officers serving with the Canadian Forces Military Law Centre (CFMLC), which is part of the Canadian Defence Academy located in Kingston. Also, legal officers serve with the Office of the Legal Advisor to the DND/CF, an organization which includes CF legal officers and civilian lawyers with the Department of Justice. Permanent legal offices are located in Ottawa at National Defence Headquarters (NDHQ) and the four operational command headquarters, at select bases in each of the regions in Canada, and in Europe and the United States.

Structurally, the Office is composed of six sub-organizations: the Canadian Military Prosecution Service, the Defence Counsel Services and the following four divisions which are each headed by a Deputy Judge Advocate General (DJAG): Military Justice and Administrative Law, Operations, Regional Services and Chief of Staff. Each of these divisions provides direct support to the military justice system.

Organization charts outlining the structure of the regular and reserve components of the Office of the JAG are included at Annex B.

[7] Ministerial Organization Order 96-082 dated 1 August 1996. For the authority relating to command generally, and command of commands specifically, see *Queen's Regulations and Orders for the Canadian Forces* [QR&O], Chapter 3, Section 2 – *Command*, and article 3.21 – *Command of Commands*.

[8] QR&O, article 4.081(2).

[9] QR&O, article 4.081(4).

The Canadian Military Prosecution Service (CMPS)

The CMPS is headed by the Director of Military Prosecutions (DMP) who is a legal officer appointed by the Minister for a renewable term of four years and is a barrister or advocate with at least 10 years standing at the bar of a province.[10] As provided by the NDA, the DMP is responsible for preferring all charges for trial by court martial, for the conduct of all prosecutions at court martial, and for representing the Minister on criminal appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada.[11] In addition to these statutory responsibilities, the DMP provides legal advice in support of criminal and disciplinary investigations to the CF National Investigation Service (CFNIS), which is a unit of the CF Military Police group and is mandated to investigate serious or sensitive service and criminal offences.[12]

During this reporting period, a change was made in the manner in which the CMPS provides advice to investigators with the CFNIS. A new position was created within the CMPS known as the CFNIS Legal Advisor. Although the CFNIS Legal Advisor serves under the authority of the DMP, the position is one in which a military prosecutor works directly with the CFNIS to provide legal and practical advice to investigators. The creation of this new position serves to enhance efficiency within the military justice system while allowing Regional Military Prosecutors (RMPs), to focus primarily on prosecuting a matter at court martial.[13]

In exercising prosecutorial discretion to prefer charges and conduct prosecutions, the independence of the DMP is protected by both the institutional structures found in the NDA and the common law.[14] In this way, the role of the DMP is analogous to that of a director of public prosecutions in the civilian criminal justice system.

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[10] *Supra* note 1 at s. 165.1. On 17 January 2005, Captain (Navy) Holly MacDougall was appointed DMP.

[11] *Ibid.* at section 165.11.

[12] See http://www.vcds.forces.gc.ca/cfpm-gpfc/cfp-gcp/nis-sne/index-eng.asp.

[13] This is consistent with the November 2008 Lesage-Code Report to the Attorney General of Ontario found at: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/lesage_code_report_en.pdf.

[14] See *R. v. Balderstone* (1983), 8 C.C.C. (3d) 532 (Man. C.A.). Leave to appeal to the Supreme Court of Canada denied: see [1983] S.C.C.A.No. 44, 52 N.R. 72. Canadian courts have placed significant legal restrictions on the review of the exercise of prosecutorial discretion. Courts will undertake such reviews only in the clearest case of abuse of process. See e.g. *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372.

The NDA provides that the DMP acts under the general supervision of the JAG, and that the JAG may issue general instructions or guidelines to the DMP in respect of prosecutions in general or in relation to a particular prosecution.[15] During the reporting year, no instructions or guidelines were issued.[16]

Annex C of this report contains the annual report of the DMP.[17]

Defence Counsel Services (DCS)

The Director of Defence Counsel Services (DDCS) is an officer appointed by the Minister for a renewable term of four years and is a barrister or advocate with at least 10 years standing at the bar of a province.[18] The DDCS provides, supervises and directs the provision of legal services to accused persons as defined in regulations.[19]

The DDCS is statutorily independent from other CF and DND authorities for the purpose of protecting the DDCS from potentially inappropriate influence. Legal officers assigned to DCS represent their clients in accordance with DDCS and JAG policies and their respective Code of Professional Conduct from their provincial or territorial law society. These safeguards are designed to preserve and enhance the legal and ethical obligations that DCS legal officers owe to the CF members they represent. Furthermore, communications with their clients are protected at law by solicitor-client privilege.

Although, the DDCS acts under the general supervision of the JAG, the JAG is not authorized to issue instructions or guidelines in respect of a particular defence or court martial. The JAG, however, may issue general instructions or guidelines in writing in respect of defence counsel services.[20] During the reporting year, no such general instructions or guidelines were issued.

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[15] *Supra* note 1 at s. 165.17. The JAG must give a copy of every such instruction to the Minister. The DMP must ensure that such instructions are made available to the public, except in limited cases where the DMP decides that release to the public of an instruction or guideline would not be in the best interests of the administration of military justice.

[16] See JAG Policy Directives to DMP: www.forces.gc.ca/jag/publications/directives-eng.asp.

[17] This report is made pursuant to DMP's requirement to report annually to the JAG. See QR&O, article 110.11 – *Annual Report.*

[18] *Supra* note 1 at ss. 249.18 (1) and 248.18(2). On 19 April 2007, Lieutenant-Colonel Jean-Marie Dugas was reappointed DDCS for a second four-year term, commencing 1 September 2007.

[19] See QR&O, article 101.20 - *Duties and Functions of Director of Defence Counsel Services.*

Annex D of this report contains the annual report of the DDCS.[21]

Deputy Judge Advocate General / Military Justice and Administrative Law (DJAG/MJ&AL)

DJAG/MJ&AL is responsible for providing DND and CF authorities with legal support in relation to military justice, military administrative law, compensation and benefits and other military personnel matters. The DJAG/MJ&AL organization comprises the Directorate of Law/Military Justice Policy and Research (DLaw/MJP&R), the Directorate of Law/Military Personnel (DLaw/Mil Pers), the Directorate of Law/Administrative Law (DLaw/Admin Law), and the Directorate of Law/Compensation, Benefits, Pensions and Estates (DLaw/CBP&E).

With the support of DLaw/MJP&R, the DJAG/MJ&AL develops and advises the JAG on military justice policy, collects and maintains information and statistics related to the military justice system, in particular the maintenance of the Summary Trial Database, and advises the Canadian Forces Provost Marshal in relation to professional standards and military police policies and doctrine. DLaw/MJP&R is responsible for the Summary Trial Process Survey, an annual survey of summary trial participants and other stakeholders designed to measure the efficacy of the summary trial process and provide a means of determining ways of improving that system.

Deputy Judge Advocate General / Operations (DJAG/Ops)

The DJAG/Ops is responsible for providing legal support to CF and DND authorities in relation to all matters related to operational law. The DJAG/Ops division is comprised of the Strategic Joint Staff Legal Advisor (SJS LA), the Directorate of International and Operational Law (DI&OL) the Directorate of Law/Intelligence and Information Operations (DLaw/I&IO) and the legal advisors to the four operational commands: Canada Command (Canada COM), Canadian Expeditionary Force Command (CEFCOM), Canadian Special Operations Forces

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[20] *Supra* note 1 at s. 249.2. The DDCS must make any general instructions or guidelines available to the public.

[21] This report is made pursuant to the DDCS's requirement to report annually to the JAG. See QR&O, article 101.20(5) – *Duties and functions of Director of Defence Counsel Services.*

Command (CANSOFCOM) and Canadian Operational Support Command (CANOSCOM).[22]

Prior to the current reporting period, DI&OL was known as the Directorate of Strategic Legal Analysis (DSLA). This change was effected on 8 September 2008. DSLA was itself the successor organization of the Directorate of Law International.

Through each of the operational command legal advisors, DJAG/Ops is responsible for providing all legal support relating to military justice matters within the respective commands. In particular, through the CEFCOM legal advisor, DJAG/Ops oversees all legal officers on deployed operations and provides legal support to deployed military police, CF formations and units on military justice issues. While participating in operations, members of the military police assigned to the CFNIS continue to receive legal support from the DMP on investigatory matters.

Deputy Judge Advocate General / Regional Services (DJAG/Reg Svcs)

The DJAG/Reg Svcs division comprises the legal offices located on selected bases and areas in each of the regions of Canada (Pacific, Western, Prairie, Central, Eastern and Atlantic) as well as in the United States and Germany.[23] Through these offices, the DJAG/Reg Svcs is responsible for providing general legal support, including advice on military justice matters, to the chain of command.

In terms of military justice matters, the regional offices provide direct legal support to regular and reserve force units, including the military police, in relation to military justice issues including the conduct of investigations, the laying of charges, the disposal of charges at summary trial and the referral of charges to courts martial. Members of the military police assigned to the CFNIS receive legal support from the DMP on investigatory matters.

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[22] For further information concerning these Commands, see:
Canada COM: www.canadacom.forces.gc.ca,
CEFCOM: www. cefcom.forces.gc.ca,
CANSOFCOM: www.cansofcom.forces.gc.ca, and
CANOSCOM: www.canoscom.forces.gc.ca.

[23] For particulars, see Annex B.

Deputy Judge Advocate General / Chief of Staff (DJAG/COS)

The DJAG/COS division is responsible for providing the necessary support and administrative services to the Office of the JAG including financial services, information management, library services and training as well as overseeing all non-legal military personnel and civilian staff in the Office of the JAG.

Canadian Forces Military Law Centre (CFMLC)

The CFMLC is the military legal education and training delivery organization for the CF. The centre provides legal education and training with the aim of enhancing discipline across the CF and ensuring that the CF is capable of carrying out its current and future missions in accordance with domestic and international law.[24] Its mission includes providing legal research, training and education to the CF, including legal officers. The CFMLC and its complement of nine legal officers deliver a broad range of legal education and develop various military law publications for the CF.

In particular, CFMLC is responsible for administering training programs for the certification and re-certification of presiding officers. The JAG, however, is responsible for certifying that CF members are qualified to perform their duties in the administration of the *Code of Service Discipline*. The CFMLC and its mandate are discussed in further detail in Chapter 5.

Chief Warrant Officers (CWOs) and Chief Petty Officers 1st Class (CPO1s) within the Office of the JAG

There are nine CWO/CPO1 positions within the Office of the JAG. The JAG CWO is located with the Office of the JAG in Ottawa and serves as a conduit between the JAG, the chain of command and NCMs in respect of the administration of military discipline.[25] This position ensures that the Office of the JAG has direct access to the knowledge and experience of senior NCMs in relation to discipline.

The remaining CWOs and CPO1s are located in each of the regions of Canada and are associated with either an Assistant Judge Advocate General (AJAG) office in each region or a designated Deputy Judge

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[24] See www.cda.forces.gc.ca/cfmlc-cdmfc/index-eng.asp.

[25] CWO Normand Trépanier was appointed as the JAG CWO in April 2006.

Advocate (DJA) office.[26] The AJAG and DJA CWOs/CPO1s perform an important role by maintaining direct contact with the NCMs situated in their respective regions and providing an invaluable link between the local legal office and the senior NCMs in relation to disciplinary matters.

1.4 International Operations

The Office of the JAG continues to deploy legal officers to provide direct legal support to CF operations. During this reporting year, a total of 40 legal officers (39 regular force legal officers and one reserve force legal officer)[27] were deployed in support of several international operations: Operation ATHENA in Afghanistan; Operation CROCODILE in the Democratic Republic of the Congo; Operation SAFARI in Sudan; Operation ALTAIR, a naval operation in the Persian Gulf region; and Operation SEXTANT, a naval operation in the Gulf of Aden.[28] The number of regular force legal officers deployed in support of operations during the reporting period represents approximately 25% of the regular force positions within the Office of the JAG.

1.5 Office of the DND/CF Legal Advisor (DND/CF LA)

While the JAG superintends the administration of military justice and provides advice on all matters relating to military law, the DND/CF LA also provides legal support to the DND and the CF. The Office of the DND/CF LA is a Legal Services Unit of the Department of Justice, and its staff is comprised of both lawyers from the Department of Justice and military legal officers posted from the Office of the JAG.

The areas of the law for which the Office of the DND/CF LA has primary responsibility are: legislative and regulatory services, finance (other than military compensation and benefits), claims and civil litigation, materiel procurement, intellectual property, environment and real property, civilian labour relations, and public law – including human rights, Aboriginal law and information and privacy issues. As well, the Office has dedicated counsel to provide specialized legal services in the area of non-public property – a valuable resource to legal officers giving advice in this area. The Office of the DND/CF LA also advises on national security issues related to information sharing; privacy and access; intellectual property and civil liberties; legal challenges to national security-related legislation and government activities; and legislative initiatives.

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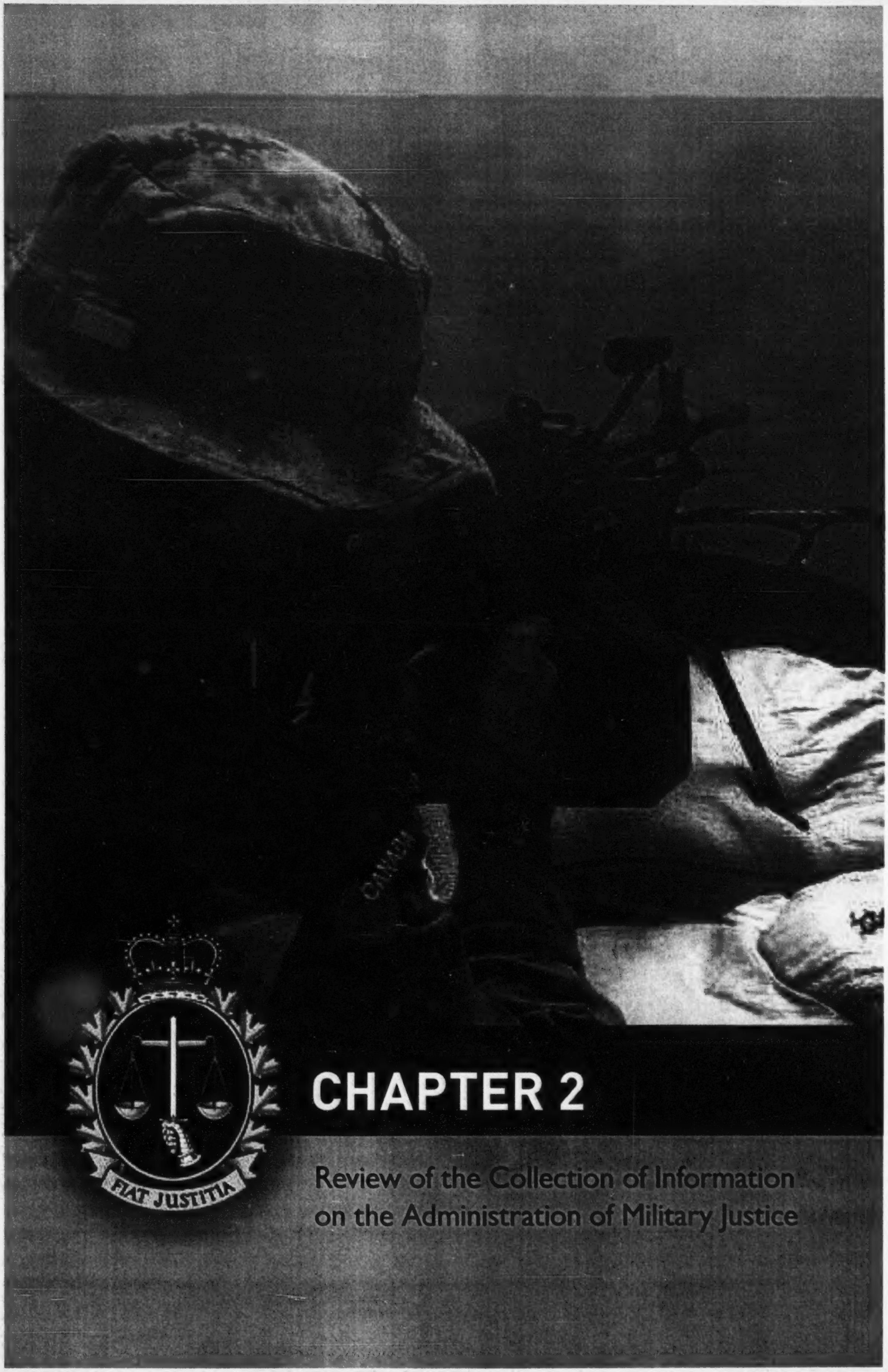
[26] There is an AJAG CWO/CPO1 at the following offices: AJAG Pacific in Esquimalt; AJAG Western in Edmonton; AJAG Prairie in Winnipeg; AJAG Central in Petawawa; AJAG Eastern in Valcartier and AJAG Atlantic in Halifax. The DJA CWO/CPO1 positions are located in Borden and Gagetown.

[27] Additionally, two reserve force legal officers were sent overseas to backfill deployed legal officers during leave periods.

[28] http://www.cmp-cpm.forces.gc.ca/dhh-dhp/od-bdo/index-eng.asp



CHAPTER 2

Review of the Collection of Information on the Administration of Military Justice

2.1 Introduction

The JAG has the statutory responsibility to conduct regular reviews of the military justice system and to report to the Minister on an annual basis on the administration of military justice.[1] The two principal methods by which the JAG fulfills these obligations are through the collection of data and statistics related to both the summary trial and court martial systems and by the conduct of surveys involving selected members of the chain of command and other individuals who have been involved in the summary trial process. This chapter outlines the different methods of data collection employed during the reporting period.

2.2 Trial Statistics

Summary Trial Database

The summary trial database contains data from each charge laid in the military justice system that has proceeded to trial by way of summary trial. The information in this database is collected from Records of Disciplinary Proceedings (RDPs).[2] The RDP is the form used in each discipline matter to lay a charge or charges under the *Code of Service Discipline*. The RDP also records the key pre-trial steps taken in relation to each disciplinary matter, including how charges are dealt with at the summary trial level and, if applicable, the results of any review. Commanding Officers are obligated to maintain a Unit Registry of Disciplinary Proceedings, which includes copies of RDPs in relation to each charge in their unit, applications for referral to courts martial, copies of reports and investigations of service offences and copies of the decisions of reviews of summary trials.[3] Further, units are required to forward a copy of all RDPs that contain charges for which a final disposition has been made to the unit's legal advisor who reviews the documents and in turn submits them to the Directorate of Law/Military Justice Policy and Research (DLaw/MJP&R) within the Office of the JAG.[3] DLaw/MJP&R is then responsible for collecting the relevant information from each RDP, which is used to populate the database.

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[1] *National Defence Act*, R.S.C. 1985, c. N-5 [NDA], ss. 9.2 and 9.3.

[2] *Queen's Regulations and Orders for the Canadian Forces* [QR&O] article 107.07 - *Form of Record of Disciplinary Proceedings*.

[3] QR&O, article 107.15 - *Forwarding and Review of Summary Trial Documentation*. By the seventh day of each month, every CO shall forward to the unit legal advisor copies of documents that have been placed on the URDP during the preceding month.

The information entered in the summary trial database enables users to generate reports and statistics relevant to the summary trial process. These research products provide a snapshot of summary trial activity, illustrate trends and are used to analyse the state of the summary trial system. For example, data may be used to compare numbers of summary trials between reporting periods, the types of charges being laid and sentences imposed. This information assists in assessing the level of confidence in the summary trial system.

Annex E contains summary trial data from the 2007-2008 and the 2008-2009 reporting periods. This data reflects the distribution of summary trials including demographics (language of trials, commands and ranks of the accused), a summary of charges, dispositions by charge, punishments and reviews. Additionally, Annex E provides a comparison of the five most prevalent types of offences dealt with by summary trial over the last six years.[4]

As mentioned above, the information maintained in the summary trial database is drawn from the RDPs that are forwarded by units to DLaw/MJP&R. Accordingly, the database is dependent on the timely receipt of the RDPs. In the 2007-2008 Annual Report, it was reported that 2035 summary trials were conducted. Subsequent to the preparation of that report, an additional ten RDPs were received. Consequently, the number of summary trials has been amended to a total of 2045.

During the reporting period, a JAG-ordered review of the issue of late submission of RDPs was conducted and a number of measures have been implemented to avoid or reduce the likelihood of such discrepancies occurring in the future. First, RDP reporting was closely monitored throughout the reporting period, with regular status reports being provided to unit legal advisors. Second, formal notices were disseminated just before and after the end of the reporting period which emphasized the unit's obligation to submit copies of RDPs in accordance with regulations.[5] This practice will continue to ensure timely submissions prior to the cut-off date for each reporting period. Third, a later cut-off date has been used to give units more time to submit their RDPs.

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[4] The five most prevalent types of offences charged over the past 5 years are offences contrary to three sections of the NDA, namely: section 90 - *Absence Without Leave*, section 97 - *Drunkenness*, and section 129 - *Conduct to the Prejudice of Good Order and Discipline*. Section 129 is used to charge various misconduct, hence for statistical purposes it is broken down and tracked into four sub-categories: offences of a sexual nature, offences involving drugs and alcohol, offences for which an election to court martial were given, and offences for which an election was not given. The latter three subcategories of offences, as well as sections 90 and 97, are the five most frequently occurring offences in the CF.

[5] QR&O, article 107.15.

Further, a Canadian Forces General Message (CANFORGEN) was promulgated by the Chief of Defence Staff (CDS) which reminds COs of their duty to ensure timely submission of RDPs as per regulations.[6] Finally, new methods for disciplinary information gathering and tracking have been explored and incorporated into the Comprehensive Information Management Project (CIMP). The CIMP is an initiative to support the creation of a JAG Information Management System (JAGNet). JAGNet will transform information management practices within the Office of the JAG by enhancing the ability of legal officers to manage records and documents and to share information. This subject is discussed further in Chapter 7.

As a result of the aforementioned review, the following is a chart containing the updated statistics of the number of summary trials for the 1999-2009 reporting periods:

Fiscal Year	Summary Trials Reported Prior to Cut-Off Date	Cut-Off Date for Database Access for Annual Report	*Difference*	Number of Summary Trials according to Database accessed on 9 Sep 2009
1999-2000	**426**		**80**	**506**
2000-2001	**1112**		**42**	**1154**
2001-2002	**1122**		**72**	**1194**
2002-2003	**1568**	**15-Apr-03**	**125**	**1693**
2003-2004	**1610**	**15-Apr-04**	**127**	**1737**
2004-2005	**1407**	**12-May-05**	**75**	**1482**
2005-2006	**1505**	**1-May-06**	**98**	**1603**
2006-2007	**1660**	**7-Jun-07**	**74**	**1734**
2007-2008	**2035**	**1-Sep-08**	**10**	**2045**
2008-2009	**1898**	**9-Sep-09**	**0**	**1898**

Court Martial Reporting System (CMRS)

Statistics relating to courts martial are generated using information gathered and retained in the CMRS database. The CMRS is a proprietary database system written and maintained by the JAG Informatics department. The responsibility for entering the data and ensuring the accuracy of the information contained in the CMRS resides with DLaw/

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[6] CANFORGEN 054/09 CDS 261700Z MAR 09.

MJP&R. Information is provided to DLaw/MJP&R by the Canadian Military Prosecution Service (CMPS) in the course of their handling of charges referred to the Director of Military Prosecutions (DMP) by the chain of command.

The data maintained in the CMRS is used to enable the JAG to monitor the court martial system and identify strategic trends. For example, the CMRS is used to generate statistics to demonstrate the length of time required in each case to complete all the stages leading to the determination of a matter, from the date a charge is laid until a final decision in any court martial or appeal. The court martial statistics for the current reporting period are found in Annex F. This annex contains data including the number and types of courts martial, demographics, a summary of the charges and the sentences imposed.

2.3 Surveys

Survey on the Summary Trial Process

Since 2000, the Office of the JAG has conducted an annual military justice survey of the summary trial process. The purpose of the survey is to assess, from the perspective of those who are involved, how well the summary trial process is working and the extent to which the regulations relating to the summary trial system are followed. The survey targets those members who have been involved in the summary trial process as Commanding Officers (COs), presiding officers, assisting officers, charge laying authorities, accused members and review authorities.

This year's survey was administered by the Director Military Personnel Operational Research and Analysis (DMPORA).[7] This marks the third year that DMPORA, and its predecessor organization, the Directorate of Personnel/Applied Research, has administered the survey on behalf of the Office of the JAG. DMPORA is a part of the Director General Military Personnel, and its principal role is to provide research services and advice within the CF and DND. Although DMPORA is an internal DND organization, strict measures were taken to ensure that the survey was conducted independently.

The Office of the JAG assisted DMPORA in preparing the survey questionnaire to ensure that the data collected was related to the target subject areas and distributed the survey by e-mail and CANFORGEN through the chain of command. DMPORA was responsible for administrating the survey and compiling the data. The integrity of the survey results has been assured through the DMPORA's application of scientific methodologies in the collection and analysis of the data. Furthermore, both the content and methodology of the survey were subject to the scrutiny and approval of the Research Review Board, which has quality control and coordination oversight for all DND/CF research. The Board is composed of seven members from DMPORA and the environmental commands.

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[7] Michaud, K., *Survey on the Summary Trial Process: 2009 Results*, Centre for Operational Research and Analysis, Technical Memorandum DGMPRA TN 2009-xx, Defence Research and Development Canada (Ottawa: Department of National Defence, 2009).

Similar to past practice, participation in the survey was solicited through a CANFORGEN and notification on the Defence Information Network. Further, in order to enhance the distribution of the survey, DMPORA compiled a list of CF members who acted as charge laying authorities, assisting officers and review authorities between 1 April 2008 and mid January 2009. An electronic copy of the survey was sent to each of these individuals. Participants were given the choice to complete the survey electronically or in paper format.

Data collection was carried out between 3 March and 2 April 2009. The results of the survey are discussed in Chapter 3 and are also available on the JAG website.[8]

Interview Survey of Stakeholders

The Military Justice Interview Survey of Stakeholders involves interviewing members of the chain of command who perform specific roles within the military justice system. The purpose of this survey is to provide a forum for military justice stakeholders to identify and discuss systemic issues relevant to the military justice system and to examine matters that would not be apparent from the statistical information available. The interview survey is conducted by an officer from DLaw/MJP&R and the JAG Chief Warrant Officer. The interview survey was last conducted during the 2006-2007 reporting period. The survey was not conducted during this reporting period due to competing military justice priorities and the personnel resources required to conduct the survey. The interview survey serves as an important tool for the military justice system and it is expected to be utilized in future reporting periods.

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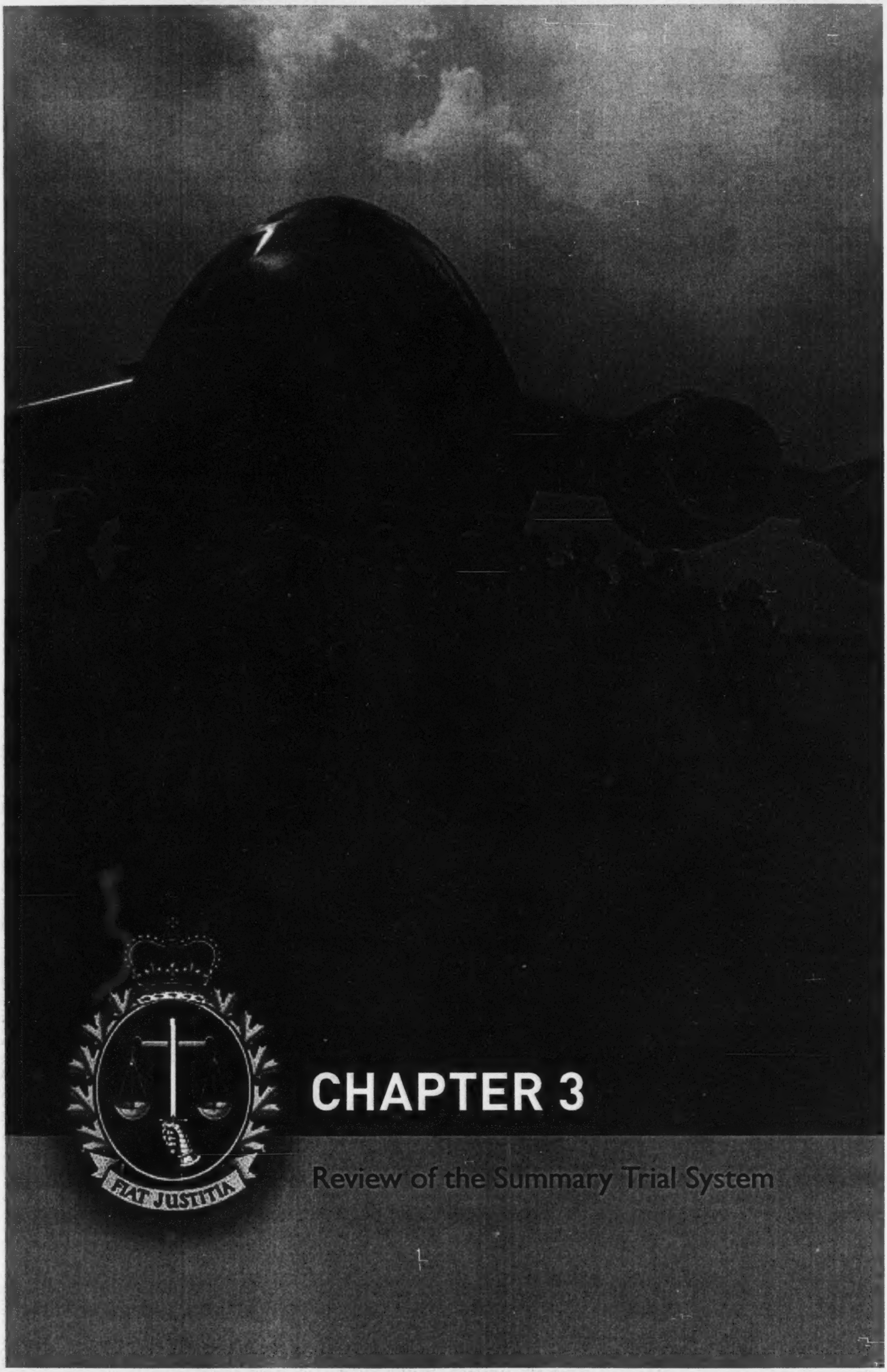
[8] www.forces.gc.ca/jag/office/publications/compliance_survey/08-09_e.pdf.

External Reviews of the Military Justice System

Timeliness for proceeding with matters in the military justice system and, in particular, the timeliness of courts martial, is a priority for the Office of the JAG. One of the initiatives undertaken by the JAG during the last reporting period was to initiate an external review in relation to the structure of the CMPS. The purpose of the review was to identify factors within the purview of the CMPS which contribute to delay in the military justice system and make recommendations on ways to mitigate delay.

The CMPS external review was conducted by two senior retired Ontario crown attorneys, and the final report with recommendations was received on 31 March 2008. As a result of the review and recommendations, the CMPS initiated several reforms to reduce delay. This report is discussed in greater detail in Chapter 6.

In addition, an external review involving Defence Counsel Services was commenced during the last reporting period. The results will be discussed during the next reporting period.



CHAPTER 3

Review of the Summary Trial System

3.1 Introduction

In order to establish and maintain a well-disciplined military force, it is vital to have a system of military justice which provides for the timely, effective and fair disposition of service offences. The military justice system is designed to be portable and can be applied anywhere CF personnel are located.[1] Those subject to the *Code of Service Discipline*[2] (CSD) are liable to be charged and tried for breaches of the CSD, which includes violations of the provisions of the *Criminal Code* and other federal statutes, no matter where the offence takes place. In effect, the military justice system accompanies and deploys with the CF.

The military justice system as provided in the CSD is comprised of two types of tribunals for dealing with service offences: the summary trial[3] system and the more formal court martial system, which will be reviewed in Chapter 4. The summary trial system is used to deal with the vast majority of disciplinary matters in the military justice system. It has two principal purposes: to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict.[4]

This chapter sets out the statistical data collected in relation to summary trials and provides an analysis of the results of the *Survey on the Summary Trial Process*.

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[1] *National Defence Act*, R.S.C. 1985, c. N-5 [NDA] s. 60.

[2] The CSD is the foundation of the military justice system. It sets out disciplinary jurisdiction and describes service offences, punishments, powers of arrest and the organization and procedures for service tribunals, appeals and post-trial review.

[3] See generally NDA, Part III *Code of Service Discipline*, at ss. 162.3 – 164.2, and the *Queen's Regulations and Orders for the Canadian Forces* [QR&O], Chapter 108.

[4] QR&O, article 108.02.

3.2 Summary Trials conducted during the Reporting Period

Detailed statistics of summary trials held between 1 April 2008 and 31 March 2009 are provided at Annex E while key statistics and analysis are set out below.

A total of 1,963[5] disciplinary proceedings were held during the reporting period. Of the total number of CF members charged, 536 members had the right to elect trial by court martial and 28 members, or 5.2% of the accused, elected to be tried by court martial. This percentage has remained relatively consistent over the past few years; namely, it was 6.60% in 2005-2006, 8.49% in 2006-2007 and 6.80% in 2007-2008 with the overall average for the four year period of 6.78%.[6] The consistency in these figures over recent reporting periods suggests that members facing charges have continued confidence in the summary trial process. This confidence is supported by the fact that the overwhelming majority of accused members elect to be tried in the summary trial process when given the choice between summary trial and court martial.

According to the summary trial data collected for the 2008-2009 reporting period[7], a total of 1,898 summary trials were conducted. This represents a decrease of 147 summary trials, or 7.1%, from the previous reporting period. Although an earlier cut-off date was used during the current reporting period for the inclusion of Records of Disciplinary Proceedings (RDPs)(from 9 September 09 as opposed to 1 October 08), this is not believed to be a significant factor affecting the reported decrease in the total number of summary trials. As was noted in the 2007-2008 Annual Report, the number of summary trials held during each of the past six reporting periods varies both up and down over time. For instance, between the 2002-2003 and 2007-2008 reporting periods, the range of summary trials varied between 1482 and 2045 with an average of 1715.[8] Therefore, it would appear that the 1898 summary trials conducted during the reporting period, while above average, remains consistent with the 2002-2008 figures.

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[5] This figure includes the total number of summary trials (1898) and courts martial (65) conducted.

[6] The JAG Summary Trial Statistics for each of the reporting periods from 2006-2007 to 2008-2009 can be accessed through the following link: www.forces.gc.ca/jag/publications.

[7] As of 9 September 2009.

[8] Note the summary trial statistics have been corrected to reflect the issue discussed in Chapter 2.2.

Specifically, the summary trial statistics indicate some notable changes within certain commands. For example, the Canadian Expeditionary Force Command (CEFCOM) experienced a decrease in the number of summary trials from 164 to 107, or 34.8%, while the Chief of the Land Staff (CLS) and Chief of the Maritime Staff (CMS) reported respective decreases of 39 and 38 summary trials during the reporting period.

With regard to the nature of the charges laid during the reporting period, the statistics indicate that 1,264 or 53.2% of charges were laid under section 129 of the NDA – Conduct to the Prejudice of Good Order and Discipline. This figure is virtually identical to that of the 2007-2008 reporting period (53.3%). When collecting data on charges laid under section 129 of the NDA, it is important to note that four categories exist for statistical purposes: (1) offences of a sexual nature[9], (2) offences related to drug or alcohol, (3) offences where an election to be tried by court martial is offered (excluding offences captured by the first two categories), and (4) offences where no election to be tried by court martial is offered. In this reporting period, the distribution of summary trials by category of section 129 offences was as follows: 1.35% for offences of a sexual nature, 6.14% for offences related to drugs or alcohol, 13.85% where a right to elect was offered and 31.86% where no election was offered. This distribution of NDA section 129 charges was, with one exception, generally consistent with and varied minimally from the distribution reported during the 2007-2008 period. The number of section 129 offences of a sexual nature increased from 19 charges to 32 charges, representing an increased proportion from 0.72% to 1.35%. This category of offence will be monitored in order to observe any future trends.

The last annual report included an in-depth analysis of charges under section 129 of the NDA concerning the negligent discharge of weapons. During the 2006-2007 and 2007-2008 reporting periods summary trials related to the negligent discharge of a weapon represented 22.8% and 25% of the total number of summary trials. As was reported in the 2007-2008 Annual Report, it was determined that the overwhelming majority of negligent discharges involved CF members in training or in the early stages of their military careers when familiarity with weapons is at its lowest. Further, over the last few reporting periods, representatives of the chain of command have advised the Office of the JAG that training for overseas deployments has become more robust and realistic given the nature of the missions in which the CF is involved. Weapons training is conducted more frequently, more ammunition is being made available and consequently, the opportunity for negligent discharges has increased as more personnel train more frequently with weapons.

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[9] Offences of a 'sexual nature' heard at summary trial generally involve sexual harassment, inappropriate comments, inappropriate use of the internet and fraternization. Serious offences of a sexual nature such as sexual assault are dealt with at courts martial.

During the 2008-2009 reporting period, the number of summary trials conducted for negligent discharges decreased by 102 (from 510 to 408). This represents 22% of the total number of summary trials held during the reporting period. This percentage remains consistent from percentages reported in the 2006-2007 and 2007-2008 reporting periods.

It is important to note that the percentage of summary trials held in operational settings for negligent discharges decreased significantly during the reporting period. During 2008-2009, 29 summary trials related to negligent discharge offences were conducted in an operational setting. This represents 19% of all summary trials conducted in such theatres. As previously reported, the percentage of summary trials related to negligent discharge offences were 37% in 2007-2008, 43% in 2006-2007 and 33% in 2005-2006. This suggests that both enhanced training and the deterrent effect of sentencing at service tribunals is having an effect regarding the handling of weapons during operations.

3.3 Survey on the Summary Trial Process

Survey Process

For the third year, the Office of the JAG has sought the assistance of the Director Military Personnel Operational Research and Analysis (DMPORA) to conduct a CF-wide survey on the administration of summary trials. This survey is designed to:

- indicate how well CF members and units are complying with the regulations concerning the conduct of summary trials;
- contribute to the growing body of statistical information against which the performance of the military justice system can be measured;
- contribute to the ongoing review of the NDA reforms; and
- determine the effect of enhanced military justice training over the past six years.

The survey questionnaire targeted commanding officers (COs) and all other persons who were involved in the summary trial process; namely: accused members, assisting officers, presiding officers, review authorities and charge-laying authorities. The survey was widely publicized throughout the CF and was made available to potential respondents on the Defence Information Network (DIN) and in paper form from 3 March to 2 April 2009. In total, 451 responses to this year's survey were received. Respondents included 38 former accused members, 123 assisting officers, 121 presiding officers, 37 COs, 8 review authorities and 124 charge-laying authorities. The number of respondents represents a decrease of 26.7% when compared to the 2007–2008 reporting period during which there were 615 responses. In comparison, 691 responses were received by DMPORA in 2006-2007.

Given that the number of former accused members who responded to the survey was only 38 out of a potential 1,963, it would be unsafe to make definitive conclusions on trends or percentages. What is discussed below is a review of the survey results and analysis with this caveat in mind.

Survey Results and Analysis

The format of the 2009 survey was based on previous versions of the questionnaire. A question was inserted asking the respondents to identify the means by which they had been made aware of the existence of the survey. This information was used to determine the effectiveness of the various means of survey distribution. Responses to this question are examined below. As well, several changes were made to the wording of certain questions to improve clarity. Further, for the third year, questions were posed seeking respondents' views on the overall fairness of the summary trial process. Seeking such input from participants is important to evaluate the level of trust stakeholders have in the summary trial process. Providing respondents an opportunity to give specific details to this effect contributes to future improvements of the summary trial process. Collecting views on matters such as the timeliness of the process, the training of presiding and assisting officers and the access to evidence by the accused is significant in this regard.

This year's survey indicates that most of the respondents learned of its existence through the direct e-mail distribution method (50.1%), followed by the e-mail distribution by supervisors (21.3%). The CANFORGEN informed 17.6% of the respondents while notification of the survey through the DIN and JAG websites was the least reported source of information (at 4.6% and 9.0% respectively).

The survey continues to measure adherence to the three tenets of fairness in the summary trial system.

Tenet 1: Compliance with regulatory requirements.

a. COs are certified by the JAG to perform their duties in the administration of the CSD after having successfully completed the Presiding Officer Certification Training (POCT);[10]

b. Unit Registry of Disciplinary Proceedings are maintained by each unit and contain documents such as: Records of Disciplinary Proceedings (RDPs), reports of investigations and decisions following the review of a summary trial;[11]

c. RDPs are completed correctly, including the final disposition of all charges, and submitted for review to the local Deputy Judge Advocate (DJA) or to the regional Assistant Judge Advocate General (AJAG) and ultimately to the JAG;

d. Timely feedback is provided by legal advisors and review authorities; and

e. Requests from the public for access to the Unit Registries of Disciplinary Proceedings are handled appropriately.[12]

This year's survey indicates a high and increasing degree of compliance among respondents with regard to the regulatory requirements related to the administration of summary trials. Further, survey results indicate that COs are complying with the regulations requiring that they be qualified as presiding officers and maintain a Unit Registry of Disciplinary Proceedings. However, this year's survey did disclose one presiding officer who presided at summary trial without proper certification. This reporting is somewhat similar to last year's reporting period, whereby one CO, one presiding officer and one review authority had indicated having fulfilled duties related to summary trials without proper certification. As with the results in the 2007-2008 reporting period, legal officers in the field were reminded to ensure that those responsible for the administration of the CSD become and remain qualified. The DLaw/MJP&R will continue to consult and work with AJAGs and command legal advisors to develop and institute measures aimed at verifying that all presiding officers are certified or receive an exemption from the CDS to participate in the administration of military justice.[13] With regard to the provision of feedback, 85.7% of responding COs indicated having received timely comments from legal advisors, which represents a decrease from the 91.4% reported in last year's Annual Report. This issue has been brought to the attention of DJAG/Regional Services.

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[10] QR&O, article 101.09.

[11] QR&O, article 107.14.

[12] QR&O, article 107.16.

Tenet 2: Fair treatment at summary trial.

a. Trials are held in the official language chosen by the accused.

b. Accused persons who are entitled to elect trial by court martial are given the opportunity and legal support to do so.[14]

c. Accused persons receive: [15]

  1. all information identified in the regulations;

  2. access to the evidence that will be used to support the charge; and

  3. a list of witnesses who will testify to support the charge.

d. Accused persons are given the opportunity to exercise their right to put their case to the presiding officer before a finding is made.[16]

e. Accused persons are given the opportunity to exercise their right to present evidence of mitigating considerations at sentencing.[17]

This year's results reveal a substantial and increasing degree of compliance in all of the above mentioned areas. Such results indicate that in general, fair treatment was accorded to accused persons. Responses from former accused members were mostly positive, and indicated that the indices of fairness noted above were observed in the vast majority of cases. One issue of concern raised however, was the perception of bias of the presiding officer. For example, comments expressed by the accused, assisting officers, presiding officers and charging authority include the perception of pre-determined outcomes for summary trials and the notion that the chain of command holds significant influence over the summary trial process. Bias was also raised as a concern in the last two surveys.

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[13] QR&O, article 101.09.

[14] QR&O, articles 108.17 and 108.18.

[15] QR&O, article 108.15.

[16] QR&O, article 108.20.

[17] *Ibid.*

While presiding officers are required to act impartially and separate their personal interests and beliefs from their decision-making powers and duties, they also have a vested interest in the discipline of the unit. The NDA and QR&O set out a number of specific requirements to enhance impartiality at the summary trial level:

1. unless it is unavoidable, those who carry out or supervise an investigation, sign a search warrant or lay or cause a charge to be laid may not preside at the summary trial of the same matter;[18]
2. at the commencement of every summary trial, all presiding officers are required to take an oath or solemn affirmation to administer justice according to law, without partiality, favour or affection;[19] and
3. superior authorities are prohibited from intervening in any summary trial.[20]

As noted in last year's report, the issue of bias within the summary trial process was referred to the Canadian Forces Military Law Centre (CFMLC) with a request to provide additional guidance relating to the issue of bias being incorporated in military justice training. In Chapter 5 of this report, the efforts of the CFMLC in this regard are discussed, particularly as they relate to improvements in the POCT training course syllabus and materials. Bias in particular, has been addressed in the training instructions.

Tenet 3: A fair and responsive review process.

a. All accused persons are informed of their right to seek review.

b. The review process is efficient.

In the current reporting period, 71% of respondents indicated an awareness of the option to request a review of the finding and sentence passed by the presiding officer. Further, 76.9% of respondents indicated they were made aware of this right by their assisting officer. In contrast, 95.1% of the assisting officers responding indicated that they informed the accused of the right to request a review. These results are generally consistent when compared to the previous reporting period, where 5 of 8 former accused members stated that they were made aware of the right to request a review with 95.6% of assisting officers reporting they communicated this right to the accused.

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[18] *Supra* note 1 at s. 163(2).

[19] QR&O, article 108.20(2) - *Procedure.*

[20] QR&O, article 108.04 - *Summary Trial – Non-Intervention by Superior Authority.*

As reported in last year's report, the attempts to increase awareness through military justice training and the distribution of CF publications such as the Code of Service Discipline and Me and the Guide for Accused and Assisting Officers have been met with limited success.[21] In Chapter 5 of this report, details are provided with respect to the CFMLC Code of Service Discipline Familiarization Project. This project is being developed to improve awareness of the rights and responsibilities of CF members with regard to military justice issues and to improve the ability of those involved in the military justice process to provide complete information and assistance to accused members.

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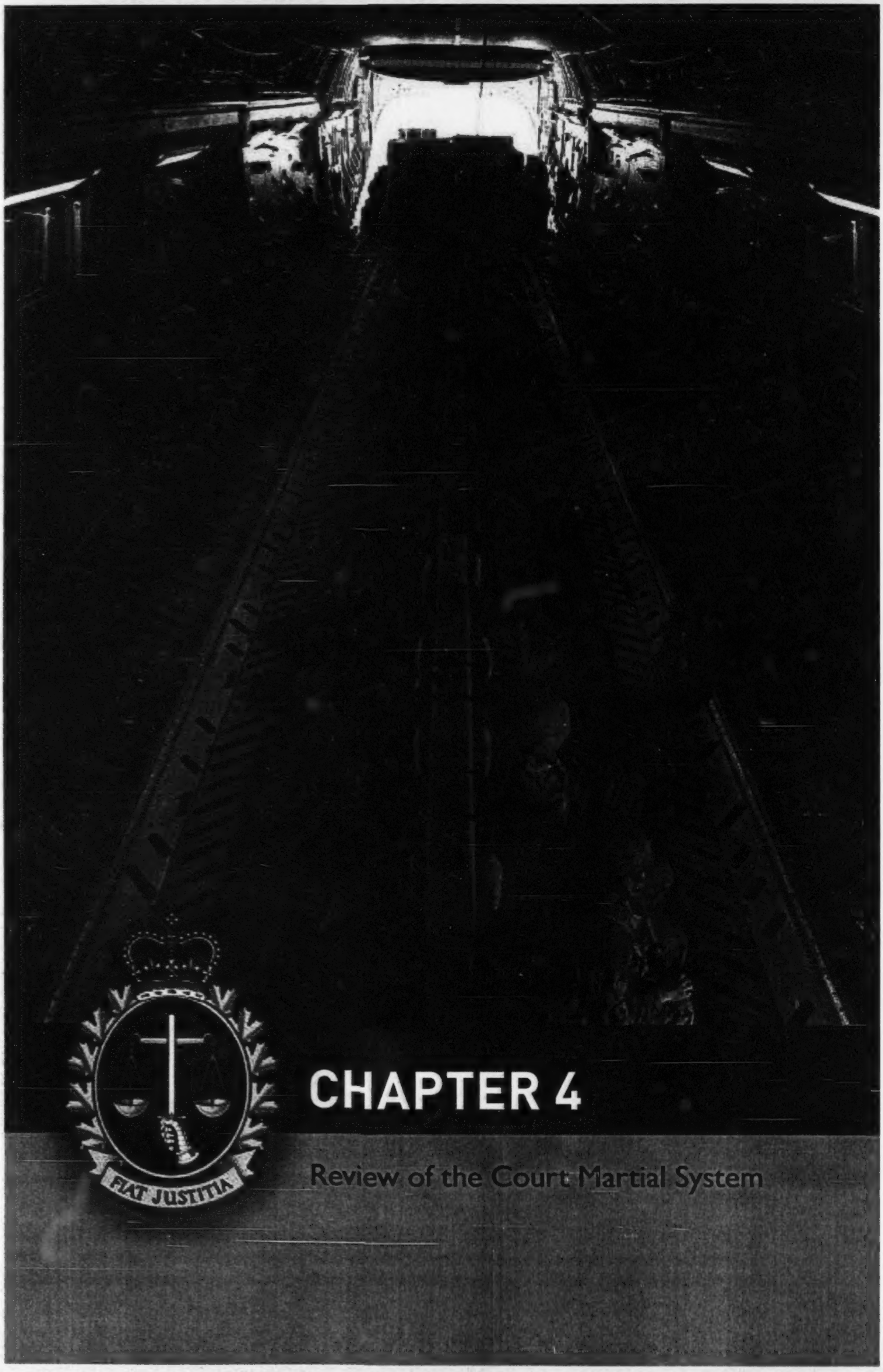
[21] These publications can be found in PDF at: www.forces.gc.ca/jag/publications/pubpages/TMLC-FCDM-eng.asp.



CHAPTER 4

Review of the Court Martial System

4.1 Introduction

The court martial system is generally used to deal with more serious breaches of military discipline. However, the right to elect court martial at summary trial also means that the court martial provides a venue for an accused person to elect a mode of trial offering a full range of constitutional protections. It is an essential safeguard in our system. While courts martial are similar to civilian criminal trials, they maintain a distinct military character. Each court martial is composed of either a military judge alone, known as a Standing Court Martial (SCM), or a military judge with a panel of five Canadian Forces (CF) members, known as a General Court Martial (GCM). The panel in a GCM performs a function roughly analogous to that of a jury in the civilian justice system. All courts martial are prosecuted by legal officers from the Canadian Military Prosecution Service (CMPS). In addition, accused tried by court martial are entitled to representation by either defence counsel from Defence Counsel Services (DCS) at the Crown's expense, or by civilian legal counsel at their own expense. This chapter will examine the activity in the court martial system during the reporting period.

4.2 Courts Martial held during the reporting period

During the reporting period, 65 courts martial were conducted.[1] While the number of courts martial for this reporting period represents a 17% decrease from the number of trials conducted during the 2007-2008 period, it is similar to the 2006-2007 reporting period, during which time 67 courts martial were conducted. Over the last five reporting periods the average number of courts martial conducted was 61.

The annual report from the Director of Military Prosecutions (DMP) is included at Annex C.[2] Detailed statistics for courts martial conducted during the reporting period from 1 April 2008 to 31 March 2009 are included at Annex F.

4.3 Office of the Chief Military Judge (CMJ)

In the military justice system, military judges preside over courts martial and perform other judicial functions as provided for under the *National Defence Act* (NDA).[3] Presently, the Office of the CMJ is comprised of four military judges: Colonel Mario Dutil (CMJ); Commander Peter Lamont; Lieutenant-Colonel Louis-Vincent d'Auteuil; and Lieutenant-Colonel Jean-Guy Perron. The Governor in Council may appoint as a military judge an officer of the CF who is a barrister or advocate of at least ten years standing at the bar of any province in Canada. Currently, military judges are appointed for a five-year term and are eligible for re-appointment on the recommendation of a renewal committee established by regulations.[4]

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[1] This figure includes two courts martial at each of which two accused were tried for a total of 67 accused.

[2] In accordance with article 101.11 of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O] the DMP is required to report annually to the JAG.

With regard to the compensation of military judges, the NDA requires that a review be conducted regularly by a Compensation Committee established under regulations.[5] Accordingly, the Military Judges Compensation Committee (MJCC) was established to commence an inquiry into the remuneration of military judges every four years beginning on the first day of September 1999.[6] The MJCC consists of three part-time members, with one person nominated by the military judges, one person nominated by the Minister of National Defence (MND) and a chairperson nominated by the first two members. The members of the MJCC in the reporting period were:

- Chair – the Honourable Guy Richard;
- Minister's nominee – the Honourable David Gruchy, Q.C.; and
- Military Judges' nominee – the Honourable Claire L'Heureux-Dubé, Q.C..

As indicated in the 2007-2008 annual report, the MJCC commenced its latest quadrennial review on 29 January 2008. The MJCC conducted a hearing on 10 and 11 June 2008 during which the Committee heard submissions from the military judges and the Government of Canada. During the course of its deliberations into compensation for military judges, the MJCC examined military justice and the role of courts martial, similarities and differences between courts martial and trials in the civilian criminal justice system, as well as the issues of judicial independence and adequacy of remuneration for judges generally.

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[3] R.S.C. 1985, c. N-5 [NDA], at ss. 165.21-165.27.

[4] For appointment, security of tenure and removal, re-appointment and retirement age see NDA s. 165.21. In June 2008, Cdr Lamont's appointment was renewed in accordance with the regulatory process.

[5] *Supra* note 3 at s. 165.22(2).

[6] QR&O, articles 204.23 to 204.27.

In reaching its conclusions with respect to the compensation of military judges, the Committee considered the following criteria: the prevailing economic conditions in Canada; the role of financial security of military judges in ensuring judicial independence; the need to attract outstanding officers as military judges; and other objective criteria considered relevant by the Committee. The MJCC submitted its report to the MND on 29 September 2008. It recommended that the salary for military judges be set at $225,000 as of 1 September 2007. It also suggested that the CMJ receive a premium of 3% in light of his additional duties.[7] The government response to the Committee's recommendation will be reported in the next annual report.

4.4 Appeals

Under the NDA, decisions rendered by courts martial are subject to two levels of appellate review. The first level of appeal is to the Court Martial Appeal Court (CMAC). The CMAC is authorized under the NDA to consider appeals brought forward by the MND or the person tried under the NDA.[8] The second level of appeal is to the Supreme Court of Canada (SCC). A decision of the CMAC can be appealed to the SCC by the MND or the person tried in the circumstances set out in section 245 of the NDA.

Individuals who appeal a court martial decision may be represented at public expense by defence counsel from DCS. The Appeal Committee is responsible for determining whether an appellant will be provided legal representation at public expense.[9] During the reporting period, regulatory amendments modified the structure and functioning of the Appeal Committee to reflect the recommendations made in the Lamer Report. These amendments are discussed in greater detail in Chapter 6.

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[7] Report on the Compensation of Military Judges, MJCC September 2008, available at: www.forces.gc.ca/site/reports-rapports/mjcc08/mjcc_report2008_eng.pdf.

[8] *Supra* note 3, ss. 230 and 230.1.

[9] QR&O 101.21.

Below is a table containing a summary of recent CMAC activity.

Reporting Period	Appeals Carried Over[10]	Appeals Commenced	Appeals Disposed Of	Appeals Discontinued/ Abandoned
2007/2008	8	10	7	1
2008/2009	10	16	9	7

At the beginning of the reporting period, ten appeals which had commenced during the previous reporting periods were ongoing. Nine of these appeals were initiated by convicted members and one by the DMP. During this reporting period, sixteen appeals were initiated, three of them by the DMP. Of the twenty-six appeals, four were dismissed, three were abandoned by the appellants, and nine were heard and determined by the CMAC. These are reviewed in detail below. Three decisions had yet to be issued before the end of the reporting period, and seven appeals had yet to be heard by 31 March 2009. A tabular breakdown of the appeal statistics for this reporting period is found at Annex G of this report.

R. v. Trépanier[11]

On 6 February 2006, Officer Cadet (OCdt) Trépanier was charged under section 130 of the NDA for sexual assault, contrary to section 271 of the *Criminal Code*. After his court martial was convened, his counsel filed a preliminary motion challenging the constitutionality of section 165.14 and subsection 165.19(1) of the NDA, as well as article 111.02(1) of the *Queen's Regulations and Orders* (QR&O). These provisions provide the DMP with the authority to select the type of court martial. The appellant challenged the authority of the DMP as an unjustifiable breach of the appellant's right to present a full answer and defence and to control the conduct of his defence under section 7 and subsection 11(d) of the *Canadian Charter of Rights and Freedoms* (*Charter*).[12] The CMJ, who tried the accused, dismissed the motion. OCdt Trépanier was found guilty on 29 January 2007 and was sentenced to a reprimand and a fine of $2,000.[13]

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[10] These represent appeals commenced in prior reporting periods and carried over to subsequent reporting periods.

[11] [2008] CMAC 3.

[12] Section 7 of the *Charter* provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Subsection 11(d) of the *Charter* provides that "Any person charged with an offence has the right… to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

The CMAC found that the provisions of the NDA and QR&O which gave the DMP sole authority to determine the mode of trial of an accused violated the *Charter* rights of an accused to make a full answer and defence. The Court disagreed with the Crown's argument that the provisions in question were merely part of the prosecutorial discretion exercised by the DMP. The Court found that the ability to select the mode of trial, where available, is a benefit, an element of strategy and a tactical advantage of the accused; therefore, it is part of an accused's right to present a full answer and defence. The Court subsequently allowed the appeal, declared that section 165.14 and subsection 165.19(1) of the NDA as well as article 111.02(1) of the QR&O violated section 7 and subsection 11(d*)* of the *Charter*. The DMP applied for leave to appeal to the Supreme Court of Canada (SCC). The application was dismissed.[14]

Subsequent to the CMAC decision in *Trépanier*, legislative amendments were implemented which reduced the types of courts martial from 4 to 2 and provided the means whereby an accused may, in certain circumstances, select the type of court martial before which he or she will be tried. These changes are discussed in greater detail in Chapter 6.

R. v. Billard[15]

On 6 July 2007, Master Corporal (MCpl) Billard pleaded guilty at his SCM to one charge under section 129 of the NDA, Neglect to the Prejudice of Good Order and Discipline. The charge related to his failure to adopt a defensive posture as required by Task Force Standing Orders (TFSO) in Kandahar Province, Afghanistan, during an attack on the Forward Operating Base (FOB) at which the member was serving. After accepting his guilty plea, the Military Judge sentenced MCpl Billard to detention for a period of 21 days. The member appealed the severity of the sentence.

After reviewing the record and hearing the appellant's arguments, the CMAC upheld the sentence imposed at court martial. The CMAC found that the trial judge properly considered the relevant mitigating factors and did not improperly consider other factors in sentencing MCpl Billard. Further, given the circumstances of the offence, the CMAC

[13] *Supra* note 11 at paras 13-15.

[14] [2008] S.C.C.A. No. 304.

[15] [2008] CMAC 4.

considered the "soldier first" principle of service in the CF. According to the Court, the appellant's neglect was related to his duty as a soldier to act appropriately when his unit was under fire. His failure to obey the lawful command set out in the TFSO to adopt a defensive posture put himself and his fellow soldiers at great risk. The CMAC held that the principles of denunciation and deterrence assumed particular importance in the circumstances and that the sentence of 21 days of detention was fit and proper in the circumstances.

R. v. Stevens[16]

On 17 January 2008, Ex-Corporal (Ex-Cpl) Stevens pleaded guilty to three charges of cocaine trafficking and one charge of ecstasy trafficking (pursuant to section 130 of the NDA and contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*) before an SCM. Before accepting the guilty pleas, the Military Judge explained the elements of the offences in question, the effect of entering guilty pleas to the charges, as well as the maximum punishment for each charge. Ex-Cpl Stevens acknowledged that he understood the consequences of guilty pleas. The Military Judge accepted the guilty pleas and a joint sentencing submission was accepted. Ex-Cpl Stevens was sentenced to imprisonment for a period of 16 months on 17 January 2008. A motion for an order permitting the filing of a Notice of Appeal and an application for leave to appeal was brought forward by Ex-Cpl Stevens on 9 May 2008, despite the 30-day period for filing such notice having expired.

The accused argued that his civilian legal counsel failed to properly argue certain defences and to fully explain the consequences of a guilty plea. He also argued that he was unable to make known his desire to appeal his sentence because he had been sent to the CF service prison and was prevented from making necessary phone calls during the 30-day period provided for submitting a Notice of Appeal. The CMAC declined to extend the period provided for submitting a Notice of Appeal. The Court noted that the applicant had been asked by the Military Judge if he wished to seek release pending appeal and that he had declined to do so. Further, while regulations at the CF service prison precluded offenders from making personal phone calls until such a privilege had been earned, regulations did allow for phone calls to be made for the purpose of dealing with ongoing appeal matters.

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[16] [2008] CMAC 5.

R. v. Nociar[17]

Captain (Capt) Nociar was found guilty of one charge pursuant to section 130 of the NDA, in violation of section 271 of the *Criminal Code*, and sentenced to a reprimand and a fine of $1800. He filed an appeal challenging the legality of the conviction and sentence and sought leave to appeal the severity of the sentence. On the day before his appeal was heard, the CMAC delivered its *Trépanier* decision discussed above. The Court provided the parties with an opportunity to make submissions concerning the effect of the *Trépanier* decision on Capt Nociar's appeal. The appellant argued that a new trial was warranted, thus giving him the ability to select the type of court martial before which he would be tried. The prosecution argued that no new trial should be ordered. It argued that the CMAC should first consider the merits of the appeal before considering the effect of the *Trépanier* decision on the proceedings.

The CMAC held that Capt Nociar was entitled to the benefit arising from the *Trépanier* decision and that a new trial should be ordered. The Court reasoned that the appellant should not stand convicted as a result of a trial predicated on court martial selection procedures found to be unconstitutional. As his constitutional right to make full answer and defence had been violated by the procedures in place, the only appropriate remedy was to quash the conviction, set aside the sentence and order a new trial.

R. v. Willms[18]

Master Seaman (MS) Willms was found guilty at his SCM pursuant to section 130 of the NDA, in violation of section 266 of the *Criminal Code*. The charge resulted from the circumstances surrounding an injury to a recruit under MS Willms' command and his efforts to physically assist the recruit back to her barrack room. At court martial, the Military Judge found that MS Willms "was at least reckless as to whether or not [the Complainant] consented to being assisted by him"[19] in escorting her to her room. The Military Judge did not consider the defence of honest but mistaken belief in consent.

The CMAC noted that consent in the case of assault must be examined based on all the circumstances surrounding the incident. The Court found that the trial judge failed to properly consider the accused's grounds for believing he had obtained the complainant's consent to physically assist her in returning to her room. The Court recognized that the accused was the complainant's instructor in the context of a basic recruit course and had a duty to offer such assistance in the event of injury. Recruits had been advised at the start of training that some physical contact between staff and recruit may be necessary during the course to effect training and safety. Further, the complainant's conduct at the time of the alleged offence supported the defence's argument that MS Willms honestly believed he had obtained the consent required to offer assistance. The CMAC found the guilty verdict to be unreasonable and not one that a properly instructed trier of fact could reasonably have rendered. The guilty verdict was substituted by an acquittal.

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[17] [2008] CMAC 495.

[18] [2008] CMAC 509.

[19] 2007 CM 2021 at para 12.

R. v. Beek[20]

Ex-Cpl Beek was charged on 28 February 2005, pursuant to section 130 of the NDA, with nine counts of drug trafficking contrary to subsection 5(1) of the *Controlled Drugs and Substances Act.* At the start of his SCM, he filed an application pursuant to sections 7 and 11(d) of the *Charter* seeking a declaration that sections 165.14 and 165.19(1) of the NDA, as well as article 111.02 of the QR&O were unconstitutional. The application was heard and dismissed. He was found guilty of six charges of drug trafficking. On 26 July 2007 the presiding Military Judge sentenced him to a period of imprisonment of nine months. Ex-Cpl Beek appealed this decision to the CMAC on 10 August 2007. In light of the fact that similar issues were being challenged in other cases, Ex-Cpl Beek was granted intervenor status in the *Trépanier* case.[21] He agreed to be bound by the decision in that case.

Upon the decision in *Trépanier* being released, the CMAC quashed Ex-Cpl Beek's conviction and sentence, and directed a new trial to take place.

R. v. Liwyj[22]

In this case, Cpl Liwyj was to be tried by a Disciplinary Court Martial (DCM) as selected by the DMP in accordance with section 165.14 of the NDA. The DCM commenced on 11 December 2007. The defendant pleaded not guilty to three charges under section 83 of the NDA for disobedience of a lawful command. The court was adjourned until 27 May 2008. On 24 April 2008 the *Trépanier* decision was delivered. The accused subsequently applied for an order to have his trial held before a SCM. The Military Judge discharged the assembled panel and dismissed the application for trial before a SCM. A conditional stay of proceedings was granted. The condition imposed was that the DMP would be required to consent to a trial by SCM.

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[20] [2008] CMAC 504

[21] Supra, note 10.

[22] [2009] CMAC 1.

The main issue in this case was that the offence of disobedience of a lawful command, for which the maximum punishment is life imprisonment, now falls, as a result of Bill C-60, into the category of offences in which the accused cannot select the type of court martial. Consequently, the condition in the stay of proceedings could not lawfully be met.[23] In this case, the DMP appealed the decision of the trial judge for a conditional stay. Ultimately, both parties agreed to consent to trial by SCM pursuant to subsection 165.191(2) of the NDA.

R. v. McDougall[24]

Petty Officer First Class (PO1) McDougall was charged and convicted at his SCM of one count under section 130 of the NDA contrary to section 271 of the *Criminal Code*. PO1 McDougall and the complainant were students attending an aero-medical evacuation course. The incident in question occurred after a social outing during which both the accused and the complainant consumed alcohol. In considering the testimony of the accused, the complainant, and a witness to some of the evening's events, the Military Judge determined that, beyond a reasonable doubt, the accused had committed the offence.

The CMAC reviewed the trial record and, while acknowledging the considerable deference that must be given to a trial judge on matters related to assessing credibility, found that the Military Judge's conclusions with respect to PO1 McDougall's credibility were either not supported by the evidence or supported by insufficient reasons. The CMAC allowed the appeal, set aside the verdict of the SCM and ordered a new trial.

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[23] *Supra*, note 3. Subsection 165.191(1) now provides that the Court Martial Administrator *shall* convene a General Court Martial if any charge preferred against an accused person on a charge sheet is, among other things, an offence under the NDA, other than one under sections 130 or 132, that is punishable by imprisonment for life. The section goes on, however, to provide that an accused person charged with an offence under subsection 165.191(1) may, with the consent of the DMP, be tried by Standing Court Martial [emphasis added].

[24] [2009] CMAC 2.

R. v. Couture[25]

Sergeant (Sgt) Couture was charged under section 84 of the NDA, Striking or Offering Violence to a Superior; section 85 of the NDA, Insubordinate Behaviour; and section 129 of the NDA, Conduct to the Prejudice of Good Order & Discipline (3 charges).

The accused presented an application for a plea in bar of trial pursuant to articles 112.05(5)(b) and 112.24(1)(a) of QR&O. The argument put forward supporting the application was that the charge layer had not complied with the requirement of article 107.03 of QR&O to obtain legal advice prior to laying charges for offences under the Code of Service Discipline. The Military Judge ruled that by neglecting to read the legal advice provided, the charge layer rendered the Record of Disciplinary Proceedings void.

DMP filed a Notice of Appeal with the CMAC, appealing the legality of the decision to terminate proceedings on all charges against the accused. In a unanimous judgment, the appeal was allowed and a new trial was ordered. The CMAC ruled that the only document the military judge was obligated to refer to in order to pronounce his judgment was the charge sheet signed by DMP. DMP decided not to proceed further with the charges.

4.5 Director of Defence Counsel Services (DDCS) Annual Report

In accordance with article 101.20 of the QR&O, the DDCS is required to report annually to the JAG. The DDCS Annual Report is found at Annex D. In this report, the DDCS raises a number of issues related to the administration of military justice from a defence counsel perspective. For instance, higher levels of demand were placed on DDCS services during the reporting year with increased levels of court martial files, an increase in the number of completed courts martial resulting in 92 more trial days than the previous reporting period, and the absence of one regular force defence lawyer due to deployment. In the view of DDCS, these demands were exacerbated by the resources required to address the results of the decision in *Trépanier* and the number of related challenges submitted at courts martial and to the CMAC. Numerous other issues were identified in the DDCS Annual Report. For example, the DDCS states that as a result of changes to the composition and duties of the Appeal Committee,[26] there has been a delay in the processing of applications for defence counsel at the Crown's expense by individuals convicted at courts martial. Budgeted amounts in respect of the delegated contracting authority of the DDCS were increased due in part to one matter involving an appeal led by a civilian lawyer. Another issue raised by DDCS was that some accused make decisions regarding their right to elect court martial without first exercising their right to discuss the matter with defence counsel. This matter will be reviewed by the Director of Law Military Justice Policy and Research in the next reporting period.

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[25] [2008] CMAC 502.

While challenging, the strains placed on the military justice system were faced by the members of DDCS with professionalism. Changes made to the types and selection process of courts martial, the composition and duties of the Appeal Committee and other aspects of the military justice system will only improve its efficacy and should have the desired effect of easing some of the burden faced by all participants in the military justice system. In addition to these changes, an external independent review was commenced during this reporting period to study the Defence Counsel Services. It is expected that the results of this study will address some of the highlighted concerns of DDCS and lead to a more efficient and effective Defence Counsel Service.

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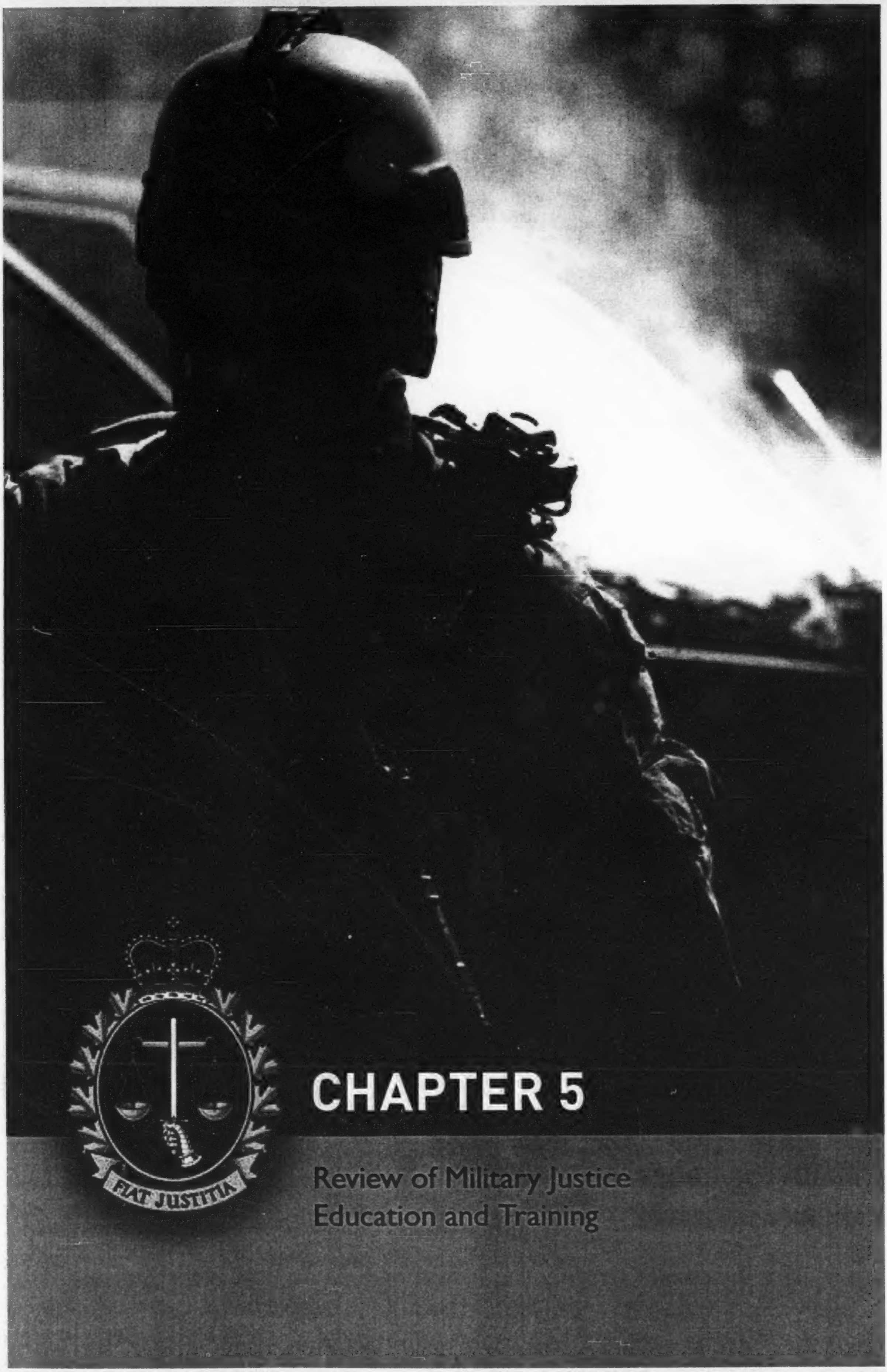
[26] QR&O article 101.21 as amended P.C. 2008-1015 of 5 June 2008 effective 5 June 2008.



CHAPTER 5

Review of Military Justice Education and Training

5.1 Introduction

One of the roles of the Office of the JAG is to provide assistance in the provision of military justice education and training to the CF community. This mandate is intended to target three groups. The first group is comprised of the CF community as a whole with the objective that all CF members have access to information about their rights and obligations under the *Code of Service Discipline* (CSD). The second group is comprised of CF members who fulfill specific roles in the administration of military justice, such as commanding officers (COs) and summary trial presiding officers. The third group is comprised of legal officers who require specific training in military law based on their rank and career progression within the legal branch.

5.2 General CF Training and Education

Canadian Forces Military Law Centre (CFMLC)

The CFMLC stood up on 30 November 2007 and is responsible for military justice education and training for the CF. The CFMLC forms part of the Canadian Defence Academy (CDA) located in Kingston, Ontario, and is staffed by legal officers who come under the command of the CDA. As an organization, the CFMLC develops and delivers operationally-focused military legal education, training and doctrine.

Military Justice Training

It is vital that all members of the CF acquire a significant level of knowledge about the military justice system. All CF members receive training in the basic tenets of the military justice system, including familiarization with the CSD, during their basic training at the CF Leadership and Recruit School in Saint-Jean-sur-Richelieu, Québec. Similar training is also provided to officer cadets at the Royal Military College of Canada (RMC) in Kingston, Ontario, as well as to those undergoing their preparatory year at Richelieu Squadron in Saint-Jean-sur-Richelieu prior to attending RMC. During the current reporting year, a total of 6781 regular force and 5009 reserve force officers and non-commissioned members (NCMs) received military justice training in this manner. The re-establishment in Saint-Jean-sur-Richelieu of the Collège Militaire Royal during the reporting period created a requirement to consider the delivery of military justice training within that institution. The CDA is currently examining this issue.

The Office of the JAG, primarily through the legal officers and Chief Petty Officers 1st Class/Chief Warrant Officers (CPO1s/CWOs) in the regional legal offices, provides direct support to the chain of command with regard to general training on military justice. During the reporting year, in addition to providing general military justice training support, legal officers and the Assistant Judge Advocate/Deputy Judge Advocate CPO1s/CWOs provided military justice instruction on numerous courses including the Air Force NCM Intermediate Air Environmental Qualification Course, the Ship's Coxswains Course, the Cadet Instructor Cadre Officer Training Course, and the CF Primary Leadership Qualification Course.

During the reporting period, legal officers continued to provide considerable support to the Officer Professional Military Education Program (OPME) military law course. The OPME program includes courses on defence management, Canadian military history, leadership and ethics and military law. The successful completion of the program is required for officers to be promoted to the rank of Major or Lieutenant-Commander. The course *DCE 002 Introduction to Military Law* contains a module addressing in detail the administration of military justice in the CF. The second module in the course details the laws applicable to armed conflict. The training is offered through self-paced distance learning and condensed on-site instruction at CF bases and wings, and is available to both officers and NCMs. During the reporting period, 1691 students successfully completed the English-language serial, while 312 students completed the French-language serial of this course.

5.3 Training for the Administration of the Military Justice System

Presiding Officer Certification Training (POCT)

The JAG is responsible for the provision of training and certification of superior commanders, COs and delegated officers in the administration of the CSD at the summary trial level.[27] POCT was specifically designed to meet this requirement, and as such, it provides candidates with the tools necessary to discharge their duties in the administration of the CSD. While POCT is primarily designed for the qualification of prospective presiding officers to preside at summary trials, the training is also beneficial to senior NCMs who perform vital roles in the disciplinary process such as investigators and charge-laying authorities. POCT is also taken by junior officers who may be expected to act as assisting officers in the summary trial system. During the reporting period, 89 POCT in-service serials were conducted at which a total of 837 CF members successfully completing the program (647 regular force members and 190 reserve force members). Of this total, 638 were officers and 199 were NCMs.

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[27] *Queen's Regulations and Orders* [QR&O], articles 101.09 and 108.10 (2)(a)(i). Before superior commanders and COs assume their duties, they must be trained in accordance with a curriculum established by the JAG and certified as qualified to perform their duties.

In the last annual report, the POCT Transformation project was outlined. This comprehensive review of the substance and delivery of the current POCT program includes the review and development of enhanced training in two key areas of military justice: unit investigations and the laying of charges. Over the course of the current reporting period, work continued on the development of a more comprehensive combined distance learning/in-service instructional format that will address administrative training challenges through the use of interactive computer-based learning. The goal is to reduce duplication between distance learning and in-service course content, and thus permit course candidates to receive greater in-service training with emphasis on the practical aspects of presiding at summary trials. There will be increased focus on the critical analysis required of the presiding officer through the use of demonstrational videos. Work on this critical project will continue into the next reporting period.

Presiding Officer Re-Certification Test (PORT)

POCT is valid for four years from the date of successful completion of the training. Re-certification may be achieved by either attending another POCT course or completing the PORT prior to the expiry of the original certification. Most personnel obtain their recertification through completion of the on-line PORT examination.

The PORT is a randomly generated, 90-minute online test that was launched in October 2003. Should a candidate receive a failing grade after attempting the online PORT, the candidate is given the opportunity to rewrite the test after a suitable time delay. In the event of a second failure, the candidate is then required to attend another two-day POCT course in order to be re-certified. During the reporting year, 364 members were re-certified by means of the PORT.

Assisting Officer Training

As reported in the 2007-2008 Annual Report, the CFMLC advised the Office of the JAG of their intent to create an assisting officer training course that would address the spectrum of an assisting officer's roles and duties. That initiative continues to progress during the reporting period. In particular, the CFMLC undertook a detailed and focused analysis of existing regulations and doctrine, military justice training courses and manuals, aides-memoire and briefing packages, as well as input from the CF chain of command with respect to assisting officer training concerns through consultative canvassing.

As a result of this information gathering and analysis process, an assisting officer training plan was developed. It now forms the basis for a computer-based training package to be delivered via DNDLearn, the CF on-line learning environment enabling members to engage in distance education wherever they may be located.[28] During the reporting period, the CFMLC completed the design and development of a trial version of this course which will be run and evaluated during the 2009-2010 reporting period. Once lessons learned from the testing of the beta version of the course have been integrated into the training package, it will be submitted to the Office of the JAG for review and approval prior to being launched for CF-wide use.

5.4 Additional Training Initiatives

As mentioned in the last annual report, several areas have been identified which require additional training for CF members. In the context of developing educational and training programs to address these needs, the CFMLC has been engaged in other training development projects to enhance the military justice system within the CF. In addition to the training for assisting officers discussed above, the following projects will be commenced or will continue during the 2009-2010 reporting period.

Bias

Bias at the summary trial level was identified as an issue requiring greater emphasis in POCT training. Amendments to the instructor lesson plan and the development of a summary trial video training aid are underway to specifically address this issue. Greater emphasis is being placed on the requirement of presiding officers to understand the concept of reasonable apprehension of bias, and the need to continually consider this responsibility throughout all aspects of the disciplinary process, up to the final disposition of a matter.

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[28] DND Learn: www.dndlearn.forces.gc.ca/index-eng.asp.

Training of Unit Investigators and Charge Laying Authorities

As was reported in the 2007-2008 Annual Report, the CFMLC identified the need for further training in the conduct of unit disciplinary investigations and charge laying that is aimed at senior NCM's and junior officers. The design and delivery of this training continues to be developed in this reporting period and will be addressed further in the next reporting period.

CSD Familiarization Project

Increasing the awareness of CF members of their rights and obligations concerning military justice was an issue identified in the last annual report. The CFMLC reviewed several options to address this issue during the reporting period. For example, an effort to identify every course module within CF training programs which addresses the issue of military justice continues, in order to determine how existing training may be used to increase awareness of disciplinary rights and obligations. It is expected that an examination of the feasibility of a CF-wide poster campaign to inform CF members of their rights and obligations will be initiated in future reporting periods.

Review Authority Enhancement Training

During this reporting period, the CFMLC conducted an evaluation of the merits of establishing an on-line training course pertaining to the role, function and procedural considerations for senior officers expected to act as review authorities. Instead of a separate on-line course, it was decided to expand the training provided during the POCT with respect to review authorities. The preparation of this training remained on-going at the end of this reporting period.

Referral Application Aide-Memoire

The development and promulgation of a referral application aide-memoire was outlined in last year's report. This general reference document will assist referral authorities with the efficient and proper execution and processing of the documentation required to refer a matter to court martial. It will detail the best practices for regulatory compliance and for maximizing the effectiveness of the referral package to the Director of Military Prosecutions (DMP). The development of the aide-memoire will continue during the next reporting period.

Disciplinary Investigation Independence

The 2007-2008 Annual Report discussed the importance of emphasizing the need to respect the independence of the disciplinary investigation process. Both unit and military police investigations into allegations of a breach of the CSD need to be conducted in the absence of interference from the chain of command. Consequently, the *Military Police Policy and Technical Procedures Manual* has been amended with the assistance of the CFMLC. Further, specific teaching points have been developed in the POCT to highlight the issues of chain of command interference in disciplinary investigations.

5.5 Military Justice Legal Officer Training

Entry Level Training

While those joining the CF as legal officers are qualified legal practitioners in a province or territory, they have rarely been exposed to military law in law school or during the bar admissions process. In order to adequately prepare them for their military legal duties, it is necessary for all new legal officers, regardless of their previous legal or military careers, to undergo a rigorous training and educational program which includes self-study courses, in-class education, on-the-job training and operational experience. Legal Officer Basic Training (LOBT) and Legal Officer Intermediate Training (LOIT) are designed to expose new legal officers to the three pillars of military law (military justice, military administrative law and operational law). With specific regard to military justice, all legal officers in the early stage of their careers must successfully complete the POCT, a self-study program and examination on military justice, and act as junior counsel in the prosecution or defence of an accused at a court martial.[29]

LOIT is conducted in the areas of military justice, administrative law, operational law, and the law of armed conflict. These intermediate courses are required for promotion to Major or Lieutenant-Commander. During this reporting period, a total of eight legal officers completed the LOIT.

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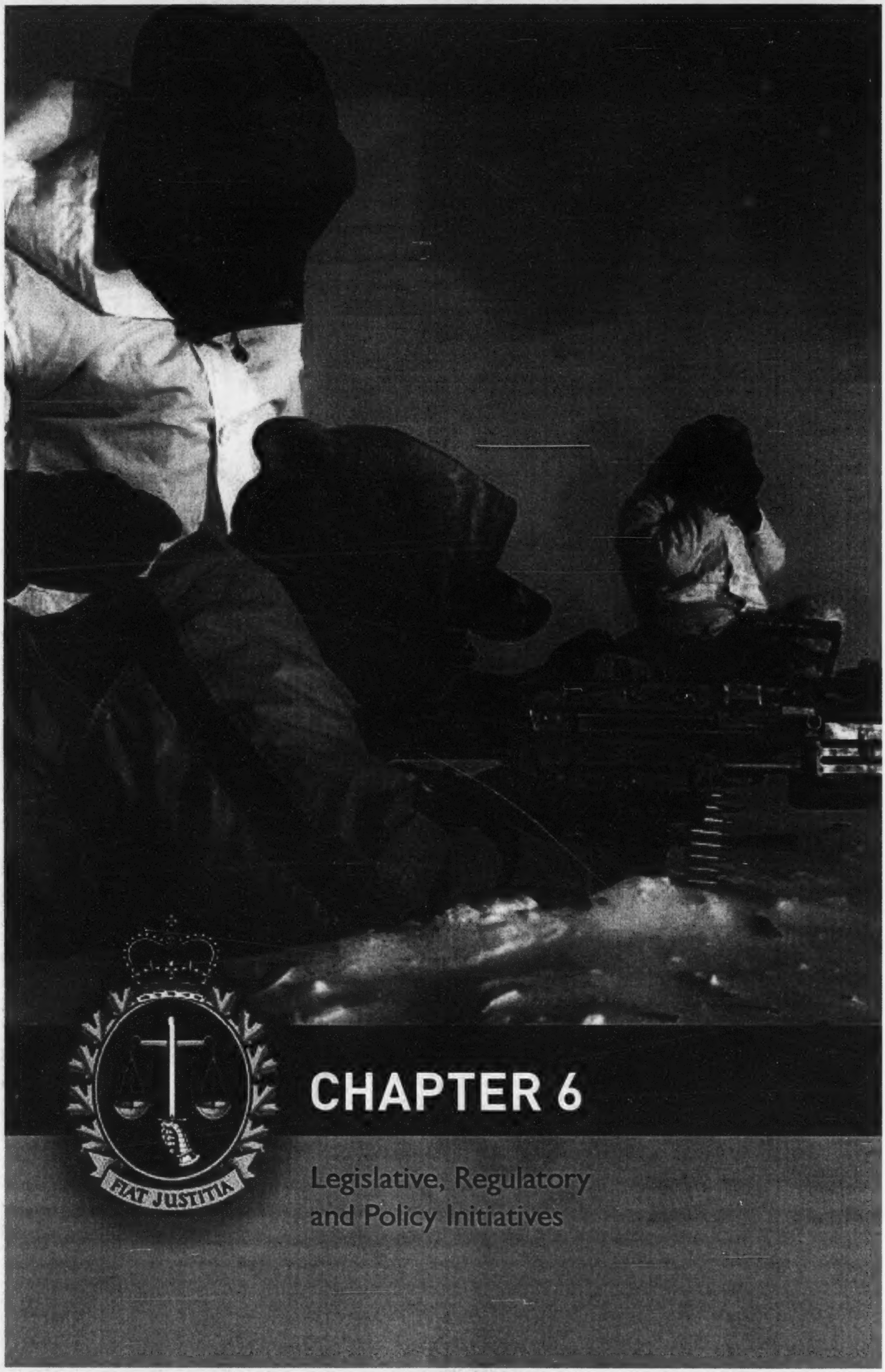
[29] In order to complete the practical requirement to act as junior counsel at a court martial, the matter must be a contested one. A court martial which consists of a guilty plea without trial will not suffice.

Additional to this training, legal officers of the Office of the JAG also participated in instruction on Special Operations Forces Law, Targeting and the conduct of Boards of Inquiry.

Continuing Legal Education

In addition to the entry-level training, the Office of the JAG actively promotes continuing legal education and, through the Deputy JAG/Chief of Staff (DJAG/COS), provides the necessary funding for legal officers to attend courses, conferences, seminars and symposia related to the three pillars of military law. During the reporting period, legal officers participated in supplemental training and education programs relevant to military justice, including courses on criminal law and advocacy training. Additionally, a number of legal officers attended criminal and constitutional law seminars and conferences sponsored by organizations outside of the CF. Twelve legal officers attended the National Criminal Law Program in Charlottetown, Prince Edward Island in July 2008, with its focus on criminal procedure, advocacy and *Charter* issues. Legal officers also attended a variety of other educational and training programs concerning issues such as trial advocacy, expert witnesses, evidence and criminal law reform provided by organizations outside of the CF.

The Office of the JAG conducts a two-and-a-half day continuing legal education workshop each year, usually in conjunction with the annual JAG conference. While the themes of the workshops change from year to year, military justice issues are normally allocated time on the workshop timetable. The Canadian Military Prosecution Service and Defence Counsel Services also hold annual training workshops concerning issues affecting their respective organizations.



CHAPTER 6

Legislative, Regulatory and Policy Initiatives

6.1 Introduction

In addition to the superintendence mandate of the administration of military justice in the CF, the JAG provides support to the Minister and the CF in relation to legislative, regulatory and policy initiatives related to military justice. This responsibility involves identifying and developing policies for the enhancement of the military justice system as well as providing direct support for all legislation and regulations relevant to the military justice system. This chapter highlights the legislative, regulatory and policy initiatives which were advanced during the reporting period.

6.2 Legislative Amendments

Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*[1]

As discussed in Chapter 4, the Court Martial Appeal Court (CMAC) decision in *R.* v. *Trépanier*[2] related to the challenge of the constitutionality of the power vested in the Director of Military Prosecutions (DMP) to select the type of court martial used to try an accused. The CMAC found that the provisions in the *National Defence Act*[3] (NDA) which gave the DMP sole authority to determine the mode of trial of an accused violated the *Charter* right of an accused to make a full answer and defence. The relevant sections were struck down and the Court ordered a new trial whereby the appellant would be given the opportunity to choose the type of court martial.

Leave to appeal to the Supreme Court of Canada (SCC) was sought by the DMP on behalf of the Minister of National Defence (MND). Without conceding the issue on appeal, the Government moved to amend the NDA through Bill C-60. The enactment amended certain provisions of the NDA governing the military justice system that included:

- Reducing the types of courts martial from four to two, thereby eliminating the Disciplinary Court Martial and the Special General Court Martial;

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[1] 2nd Sess., 39th Parl., 2008 [Bill C-60].

[2] [2008] CMAC 3.

[3] R.S.C. 1985, c. N-5 [NDA].

- Standardizing the jurisdiction and range of sentences available between the two remaining types of courts martial, the Standing Court Martial (SCM) and the General Court Martial (GCM);
- Expanding the ability of military judges to deal with pre-trial matters; and
- Requiring the unanimous decision of the five-member panel in a GCM for decisions such as the determination to be made whether an accused is fit to stand trial and the finding on the facts of the case.

Bill C-60 was introduced on 6 June 2008, received Royal Assent on 18 June 2008 and came into effect on 18 July 2008. The leave to appeal sought by the DMP on behalf of the Crown was ultimately dismissed by the SCC in September 2008.[4]

As noted above, there are now only two types of courts martial; the SCM and the GCM. Each has jurisdiction to try anyone subject to the *Code of Service Discipline* (CSD) and each has the ability to sentence a person to the full range of punishments available under section 139 of the NDA.[5]

A GCM is to be convened if any charge is preferred against an accused person that is punishable by imprisonment for life, an offence under section 130 of the NDA that is punishable by imprisonment for life, or an offence under section 130 that is referred to in section 469 of the *Criminal Code.*[6] A SCM is to be convened if every charge preferred against an accused person is an offence under the NDA, other than one under section 130, punishable by imprisonment for less than two years or by a lower punishment, or an offence punishable under section 130 and punishable on summary conviction under any Act of Parliament.[7] Where neither of these situations apply, the accused may choose the type of court martial.[8]

Bill C-60 also clarified some uncertainty in respect of the accused person's election rights and the ability of a commander to refer a matter to court martial prior to or during the summary trial. In the CMAC decision of *Grant v. R.*, the CMAC directed that a new trial be conducted by summary trial instead of at court martial.[9] Bill C-60 clearly indicated that the power of the Court Martial Appeal Court is to order a new trial by court martial. The duty to act expeditiously under the Code of Service Discipline arises upon the laying of the charge, and the one-year limitation period is a jurisdictional provision reinforcing the summary nature of those proceedings.

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[4] [2008] S.C.C.A. No. 304.

[5] Civilians subject to the CSD may only be sentenced to imprisonment and/or a fine - NDA sections 166.1 and 175. Further, courts martial are subject to maximum punishments set out in the CSD for specific offences.

[6] *Supra,* note 3, s. 165.91.

[7] *Ibid.*, s. 165.192.

[8] *Ibid.*, s. 165.193.

Bill C-45, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*[10]

Amendments were made to the NDA in 1998 through the passing of Bill C-25, *An Act to Amend the National Defence Act and to make Consequential Amendments to other Acts,*[11] which significantly changed the military justice system. In order to assess the efficacy of these changes, the amendments included a provision requiring that an independent review of the provisions and operations of Bill C-25 be conducted within five years of the Bill receiving Royal Assent. As a result, in March 2003, the Minister appointed the late Right Honourable Antonio Lamer, former Chief Justice of the SCC, to conduct the first independent review. The report containing Justice Lamer's recommendations (the "Lamer Report") was submitted to the Minister on 3 September 2003 and was tabled in Parliament on 5 November 2003.

Bill C-7, which contained the Government of Canada's legislative response to the recommendations made in the Lamer Report, was introduced in Parliament on 27 April 2006. Bill C-7 died on the Order Paper when Parliament was prorogued on 17 September 2007. A new Bill containing the Government's legislative response to the Lamer Report was then developed. The successor bill to Bill C-7, Bill C-45, was introduced in Parliament on 3 March 2008. Bill C-45 largely mirrored the contents of Bill C-7.

In summary, the amendments proposed in Bill C-45 would have:

- provided for security of tenure for military judges until their retirement;
- permitted the appointment of part-time military judges;

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[9] [2007] CMAC 2.

[10] 2nd Sess., 39th Parl., 2008 [Bill C-45].

[11] S.C. 1998, c.35 [Bill C-25].

- elaborated the purposes, objectives and principles of sentencing in the military justice system;
- provided for additional sentencing options, including absolute discharges, intermittent sentences and restitution orders;
- required the unanimous decision of a court martial panel to find an accused guilty or not guilty;
- provided the CMAC the authority to suspend a sentence;
- set out the duties and functions of the Canadian Forces Provost Marshal (CFPM);
- enhanced the timeliness and fairness of the military police complaints process;
- expanded the ability of the CDS to delegate his or her powers as a final authority in the grievance process; and
- provided an explicit requirement in the NDA to conduct future independent reviews of the military justice system, the military police complaints process and the grievance process.

Bill C-45 died on the Order Paper on 7 September 2008 when Parliament was dissolved for a federal election.

Although Bill C-45 died on the Order Paper, certain amendments contained in the Bill have been implemented through other legislative and regulatory amendments. These include:

- the requirement for unanimous consent by a court martial panel in respect of certain types of decisions including the finding of guilty or not guilty (see Bill C-60);
- changes to the composition and workings of the Appeal Committee through amendments to QR&O article 101.21, including the establishment of a committee of three members who shall, by majority vote, determine applications for defence counsel at the Crown's expense based on an interpretation of a new definition of "professional merit"; and
- the ability of a military judge to determine preliminary matters in a case once charges have been preferred by DMP.

6.3 Regulatory Amendments

Regulations relating to Bill S-3, *An Act to Amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act (SOIRA) and the Criminal Records Act*[12]

The national sex offender database was established under the *Sex Offender Information Registration Act* (SOIRA)[13] on 15 December 2004. However, the legislation did not include amendments to the NDA to make SOIRA applicable to sexual offenders convicted at courts martial. Bill S-3 amended the NDA, the *Criminal Code* and the *Criminal Records Act* to bring the military justice system fully within the regime of sex offender registration. The amending act came into force concurrently with the *Sex Offender Information Registration Regulations (Canadian Forces)* (the Regulations)[14] on 12 September 2008.

The amendments permit a court martial to order an offender, convicted of a designated offence, to register in the national sex offender database. Registration and reporting procedures in the military context mirror those in the civilian context while recognizing the unique nature of military operational demands.

Amendments to the QR&O relating to *An Act to amend the Criminal Code, the DNA Identification Act* and *the National Defence Act* and *An Act to amend certain Acts in relation to DNA Identification*

Certain sections of Bill C-13, *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act* and Bill C-18, *An Act to amend certain Acts in relation to DNA Identification,* came into force on 1 January 2008. As a result, amendments to the QR&O were required to mirror forms found in the *Criminal Code* while taking into account their use in the military justice system.

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[12] R.C.S. 2007, c. 5 [Bill S-3].

[13] R.C.S. 2004, c. 10.

[14] SOR/2008-247 - P.C. 2008-1508.

Amendments to the QR&O to implement numerous Lamer recommendations relating to the Appeal Committee

Article 101.21 of the QR&O established an Appeal Committee to receive and consider applications for legal representation at Crown expense from those convicted at court martial seeking to appeal their conviction or sentence. Previously, the Appeal Committee consisted of two members, one appointed by the CDS and one appointed by the JAG. On reviewing an application for defence counsel at Crown expense, the two members needed to agree with respect to recommending counsel be provided, or not, based on whether the application showed professional merit.

On 5 June 2008, amendments to article 101.21 of the QR&O were implemented to restructure the Appeal Committee and provide greater detail with respect to how the Committee makes its determinations. The Appeal Committee now consists of three members, appointed by the JAG, the CDS and the Director of Defence Counsel Services (DDCS). The member selected by the JAG must be a retired military judge, a retired judge advocate, or a retired judge of a superior court. The Appeal Committee currently consists of the following members:

- Commander (retired) R.J.A. Gynn, a retired judge advocate, Appeal Committee Chairperson, appointed by the JAG;
- Colonel (retired) D.A. Fairbanks, a retired legal officer in the supplementary reserve and practicing regional crown attorney in the province of Nova Scotia, appointed by the CDS; and
- Mr. Roger Landry, lawyer and Director General of the Community Legal Centre, Outaouais Region, appointed by the DDCS.

In addition to the establishment of the Appeal Committee, the QR&O amendments also included a definition of the requirement of "professional merit". For the purposes of the Appeal Committee's determination of an appeal, an appeal has "professional merit" if there is a reasonable chance that one or more of the issues raised could be successful on appeal and result in the alteration of a court martial finding or sentence, or be of importance to the administration of military justice.

6.4 Policy Initiatives

Military Justice Committees

The Administration of Military Justice Committee (AMJC) examines issues of interest to the administration of military justice. The AMJC is co-chaired by the Chief Military Judge (CMJ) and the JAG. Its membership includes a representative from the Canadian Military Prosecution Service (CMPS), Defence Counsel Services (DCS), Deputy Judge Advocate General/Military Justice and Administrative Law (DJAG/MJ&AL), Directorate of Law/ Military Justice Policy and Research (DLaw/MJP&R) and the Court Martial Administrator (CMA). The AMJC met once during the reporting period.

The AMJC sub-committee, having previously examined court martial proceedings and protocols, turned its attention to the use of video link technology and how its use has affected the administration of military justice, particularly with respect to reducing delay. The sub-committee examined the use of video link technology in the civilian criminal justice context, with particular emphasis on the provinces of British Columbia and Alberta, where such technology is in widely used. The sub-committee is expected to present its report on the subject to the committee as a whole in the next reporting period.

As discussed in previous annual reports, the Office of the JAG and the Chief Justice of the Court Martial Appeal Court (CJ CMAC) have explored the possibility of creating a committee to examine the CMAC Rules of Appeal and Procedure. These discussions have continued during this reporting period with a number of options being identified through communication between the CJ CMAC and the Office of the JAG. More information is expected in the next reporting period on what further action may be taken in this regard.

Military Justice Delay

The Office of the JAG continues to address issues related to delay in the military justice system. For instance, as reported in the last Annual Report, the JAG initiated the JAG working group on military justice delay involving representatives from the Canadian Forces National Investigative Service and Deputy Provost Martial, Environmental Command staff, DMP, Deputy Judge Advocate General/Regional Services and DLaw/MJP&R. Specifically, the working group has the mandate to:

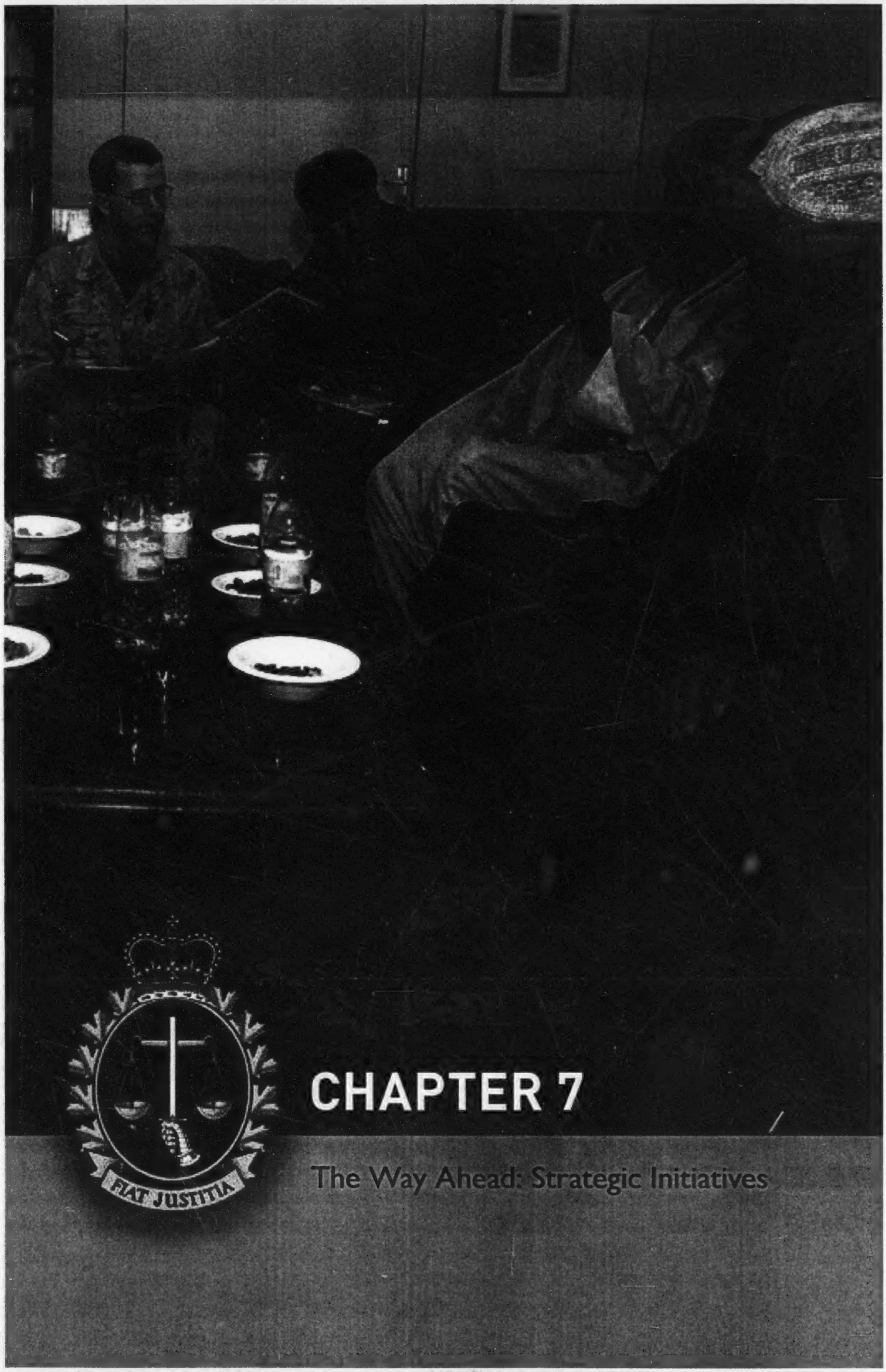
- Examine the current practices and procedures in the military justice system for the purpose of identifying areas where efficiency and expediency can be gained;
- Identify feasible long-term options for enhancing efficiency and expediency; and
- Develop an action plan involving proposed changes to the practices and procedures within the military justice system which will enhance timeliness while addressing the specific needs and circumstances of the various actors in the system

During the reporting period, the Office of the JAG developed a working group with the Office of the Canadian Forces Provost Marshal to study the use of electronic disclosure methods in the context of the provision of military police investigation reports to legal advisors. While the examination of these issues remains ongoing, feedback from legal officers suggests that greater reliance on electronic forms of investigation reports and disclosure packages is preferred given the often voluminous amount of information and documentation involved. Efforts continue to develop investigation reporting systems tailored to provide legal advisors with better reporting products during the investigatory, pre-charge and post-charge review stages. It is expected that improvements in these areas will address in part the issue of delay in the military justice system.

As reported in the 2007-2008 Annual Report, an external review of the practices and procedures of the CMPS was initiated and carried out by the Bronson Consulting Group. The objective of the external review was to identify factors within the purview of the CMPS which contribute to delay in the military justice system and to make recommendations to the CMPS on what could be done to reduce such delays. The Report examined three main areas and compared CMPS practices to those of the civilian prosecution system, namely: organization and structure; human resource management and policies; and practices and procedures.

The Report examined several key aspects of CMPS. Particular assessment was made of the CMPS' participation in the disciplinary investigation process. Current policies and practices of the CMPS, the court martial process and the human resource structure of the CMPS were also reviewed. The Report made numerous specific recommendations with respect to each of these issues. The Report and its recommendations have been reviewed with the intention of implementing the necessary changes to improve the efficiency of the military prosecution service and thereby reduce military justice delay. Many of the recommendations have been implemented by the Director of Military Prosecutions. These positive steps have been outlined in the DMP Annual Report at Annex E of this Report.

During the reporting period, a similar external review was initiated to consider the DCS organization, structure, human resource management, polices and practices. This review is expected to be completed during the next reporting period.



CHAPTER 7

The Way Ahead: Strategic Initiatives

7.1 Introduction

As the superintendent for the administration of military justice in the CF, the JAG is responsible for the ongoing review of the effectiveness of the military justice system and for developing initiatives aimed at enhancing it. To that end, the JAG continues to advance changes in two primary areas. First, as highlighted in Chapter 6 of this report, the issue of delay in the military justice system is of prime importance. Second, the Office of the JAG continues to address strategies with regard to data collection, reporting capabilities and information management strategies. Development in these areas is important to ensure the Office of the JAG maintains its ability to monitor, maintain and improve the operation of the military justice system.

7.2 The Military Justice System

Data Collection Methods

As noted in the 2007-2008 report, the Court Martial Reporting System (CMRS) and the Summary Trial Database have become essential tools for monitoring the military justice system. However, improving these systems to provide for additional flexibility will improve the means and methods to collect salient information related to the military justice system. For example, data collection methods must integrate with or support research platforms that would allow for review of complex demands for specific information. Consequently, both CMRS and the Summary Trial Database continue to undergo a conversion to web-based programs to enable all JAG users the ability to access this data. These new web-based platforms will have enhanced search functions and will allow for sophisticated statistical analysis. This project remained ongoing during the reporting period and work will continue during the next reporting period.

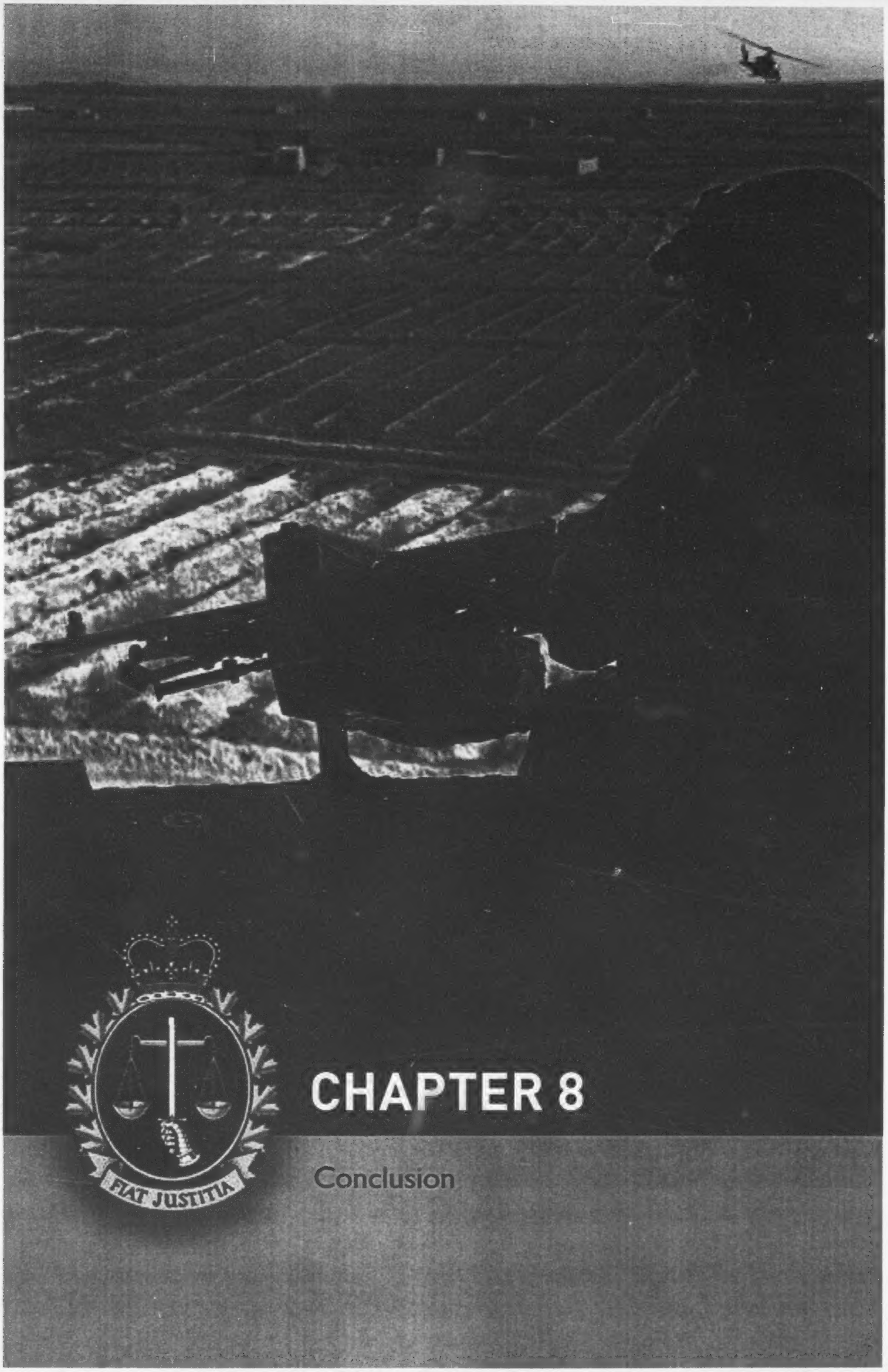
Information Management Initiatives

The Comprehensive Information Management Program (CIMP) will continue to progress in the 2009-2010 reporting period. The CIMP project will transform the business practices of the Office of the JAG by establishing an electronic-based record and documents management system, an improved case management functionality and a legal knowledge management capability. Given the JAG's superintendence function over the military justice system, the CIMP project will create a centralized system within which both statistics and substantive legal knowledge can be maintained. For the first time, legal knowledge will be available not only within a specific directorate or division, but also across all divisions within the Office of the JAG (subject to certain exceptions such as prosecution and defence counsel services). The CIMP will also comply with Department of National Defence and Government of Canada policies with respect to information and records management.

Military Justice Delay

Various initiatives were undertaken in response to the issue of delay in the military justice system during the reporting period. The Administration of Military Justice Committee is expected to continue its work in identifying sources of delay and proposing solutions to address the issue. Work progressed in the areas of electronic disclosure between military police and the legal advisors. In addition, the JAG Charge Screening Policy Directive was updated to introduce a more effective and efficient method of charge screening with a view to reduce the time it takes for legal officers to review investigations and provide advice to the chain of command regarding the appropriateness of charges. The effectiveness of this directive will be reviewed and reported on in future Annual Reports.

As discussed in chapter 6, the Canadian Military Prosecution Service underwent an external review of its service with a view of identifying efficiencies. As noted in Annex C to this Annual Report, the Director of Military Prosecutions, in response to this review, has made significant amendments to various prosecution policies. These amendments include the setting out of strict timelines to complete pre and post charge screenings of investigations along with streamlining resolution discussions in order to more efficiently conclude matters. It is hoped that these changes will demonstrate a decrease in court martial delay. The Office of the JAG will further examine the effectiveness of these initiatives during the next reporting period. Similarly, an external review of Defence Counsel Services was also conducted. The report will be received in the next reporting period. Efforts will continue to address causes of delay and implement solutions in consultation with the chain of command and other CF partners such as the Canadian Forces Provost Marshal.



CHAPTER 8

Conclusion

As was stated by the Supreme Court of Canada in *R. v. Généreux*, the safety and well-being of Canadians depends on the willingness and readiness of a force of men and women to defend threats to the nation's security. The military justice system allows the Canadian Forces to deal with disciplinary matters in an effective and efficient manner.[1] To that end, the military justice system must ensure that the requirement for discipline is balanced with the rights of CF members to be treated in a fair and just manner.

This report provides an overview of the 2008-2009 reporting period along with a synopsis of the military justice initiatives undertaken by the Office of the JAG. Overall, this report reflects that CF members as well as the Canadian public have a high level of confidence in the Military Justice system. This is the direct result of the hard work and dedication that has gone into the system.

The statistical data reviewed and analysed for this reporting period demonstrates a slight reduction in the number of summary trials conducted from the previous year.

Of the charges dealt with at summary trial, just over half were laid under section 129 of the *National Defence Act* (NDA). This number is consistent with previous years. Of note is the significant decrease in negligent discharge charges laid in operational settings. In this regard, the Office of the JAG will continue to monitor the statistics related to these offences and advise the chain of command should any trends develop.

The number of courts martial decreased from 78 in the previous reporting period to 65 during this period which is relatively consistent with the five-year average of 67. Regarding the ongoing issue of delay within the courts martial system, continued efforts are being made to address this issue including the review of the operations of Defence Counsel Services by an external review group. It is expected that the final report on this review will be submitted to the Office of the JAG in the next reporting period.

With regard to summary trials, it is possible to conclude from the military justice survey that the majority of participants, including accused, consider the system fair. This is consistent with previous reporting periods. This year's survey indicates an increase in compliance among participants with the regulatory requirements related to the administration of summary trials.

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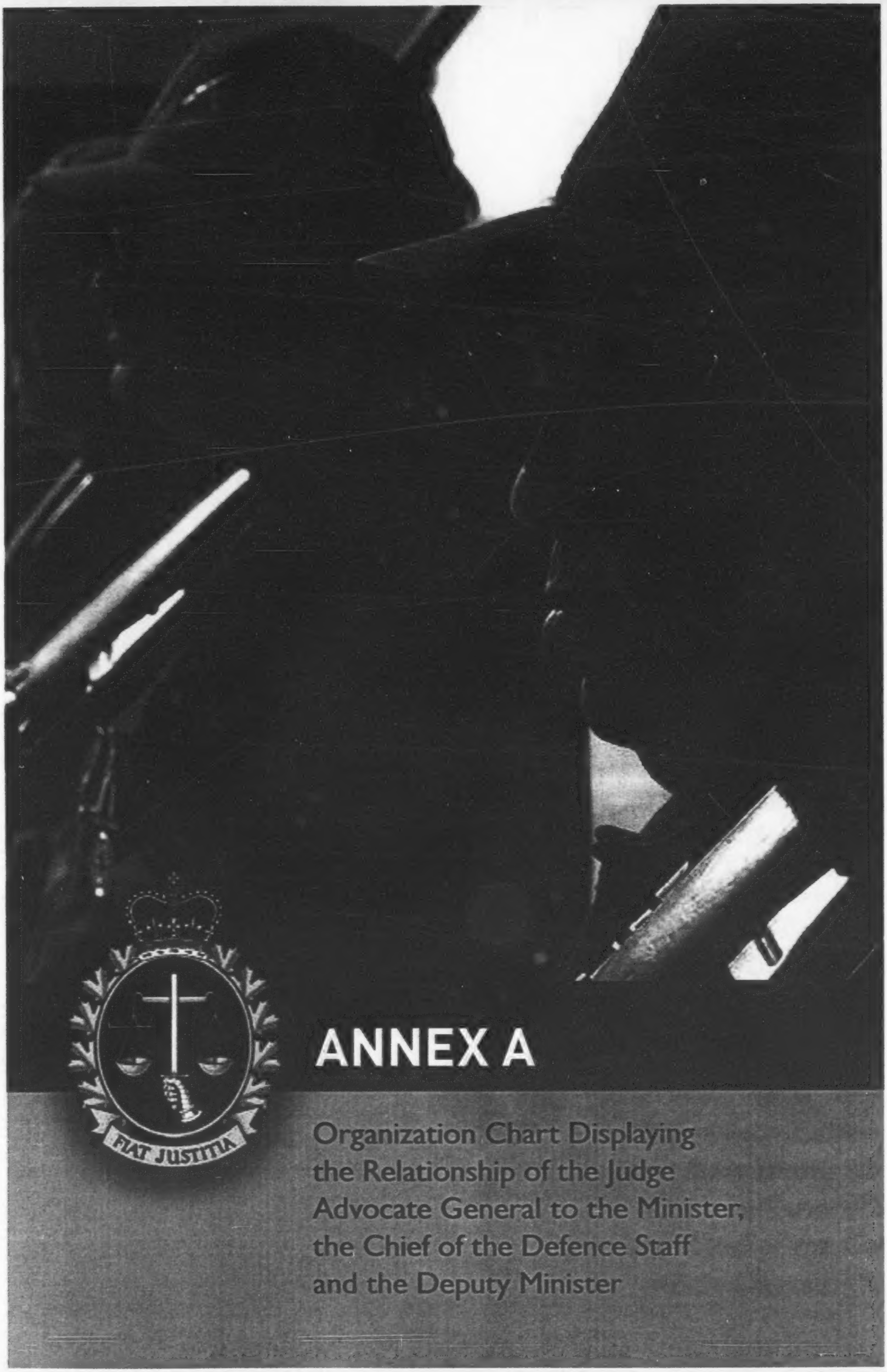
[1] *R.v. Généreux*, [1992] 1 S.C.R. 259.

The reporting period was very active from a legislative, regulatory and policy perspective. Bill C-45, among other things: proposed significant amendments to the NDA including securing the independence of military judges, elaborating the principles of sentencing in the military justice system, enlarging the scope of sentencing options, setting out the duties and functions of the Canadian Forces Provost Martial and expanding the ability of the Chief of Defence Staff to delegate his powers as a final authority in the grievance process to expedite the process of grievances. Bill C-45 did not advance past first reading due to the dissolution of Parliament in the fall of 2008.

Bill C-60 came into effect during the reporting period and served to significantly alter how the mode of trial by courts martial is determined. It reduced the types of courts martial from four to two. Other legislative and regulatory changes included the coming into force of the *Sex Offender Information Registration Act* and regulations to the military justice system along with changes to the DNA scheme and corresponding changes to the *Queen's Regulations and Orders for the Canadian Forces.*

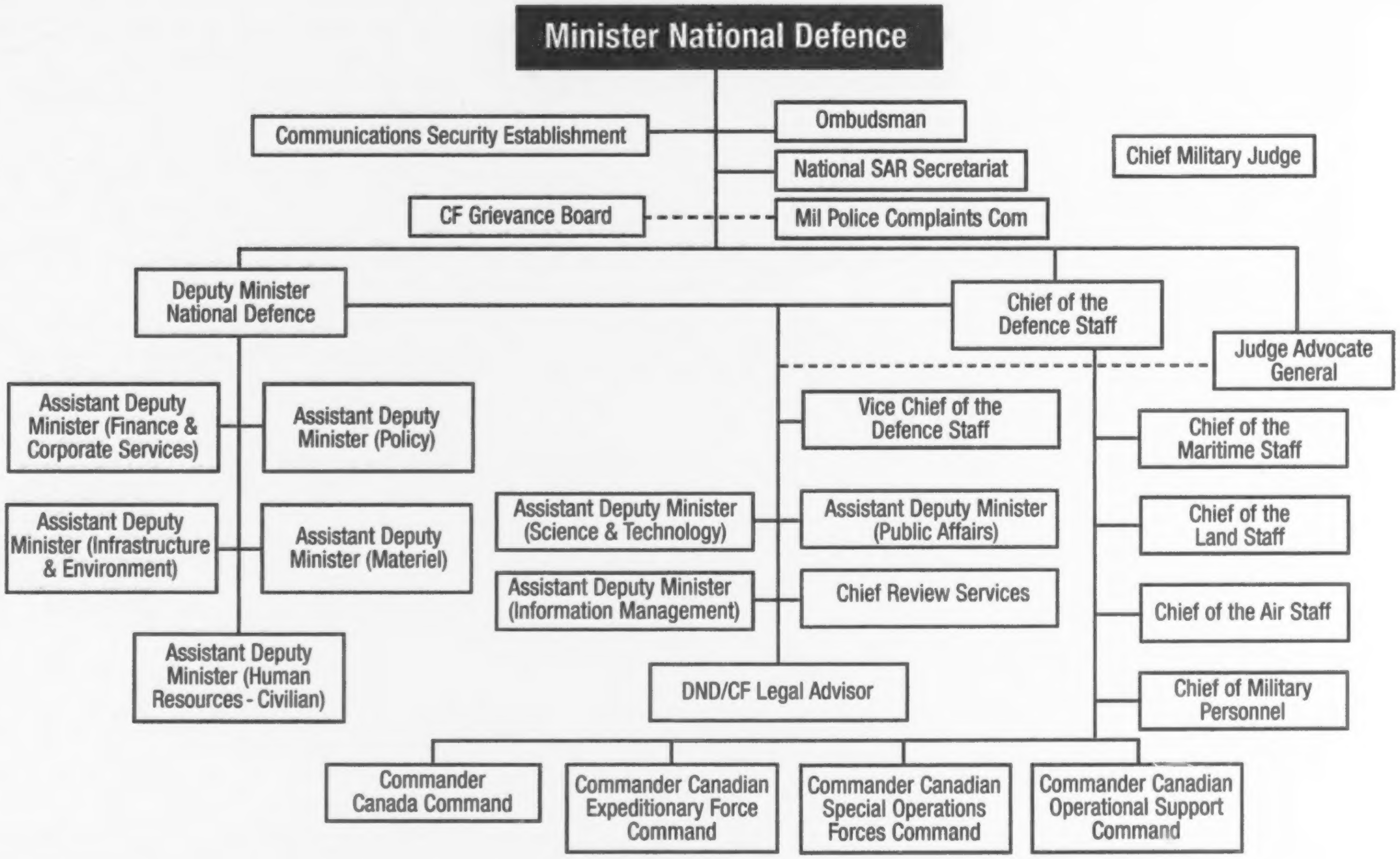
With respect to strategic initiatives, the Office of the JAG has continued to collect data on the court martial and summary trial results through the Court Martial Reporting System and the Summary Trial Database. In the next reporting period, work will continue on modernizing these information banks to a web-based format along with coordinating other information management initiatives within the Office of the JAG.

As in past years, this reporting period reflected a wide use of disciplinary tribunals supporting the notion that the chain of command is confident in its military justice system. The dedication shown by members of the Office of the JAG, in collaboration with partners from DND and the CF, has served to support the operational effectiveness of the military justice system and the rule of law by enhancing that system through legislative, regulatory or policy development.

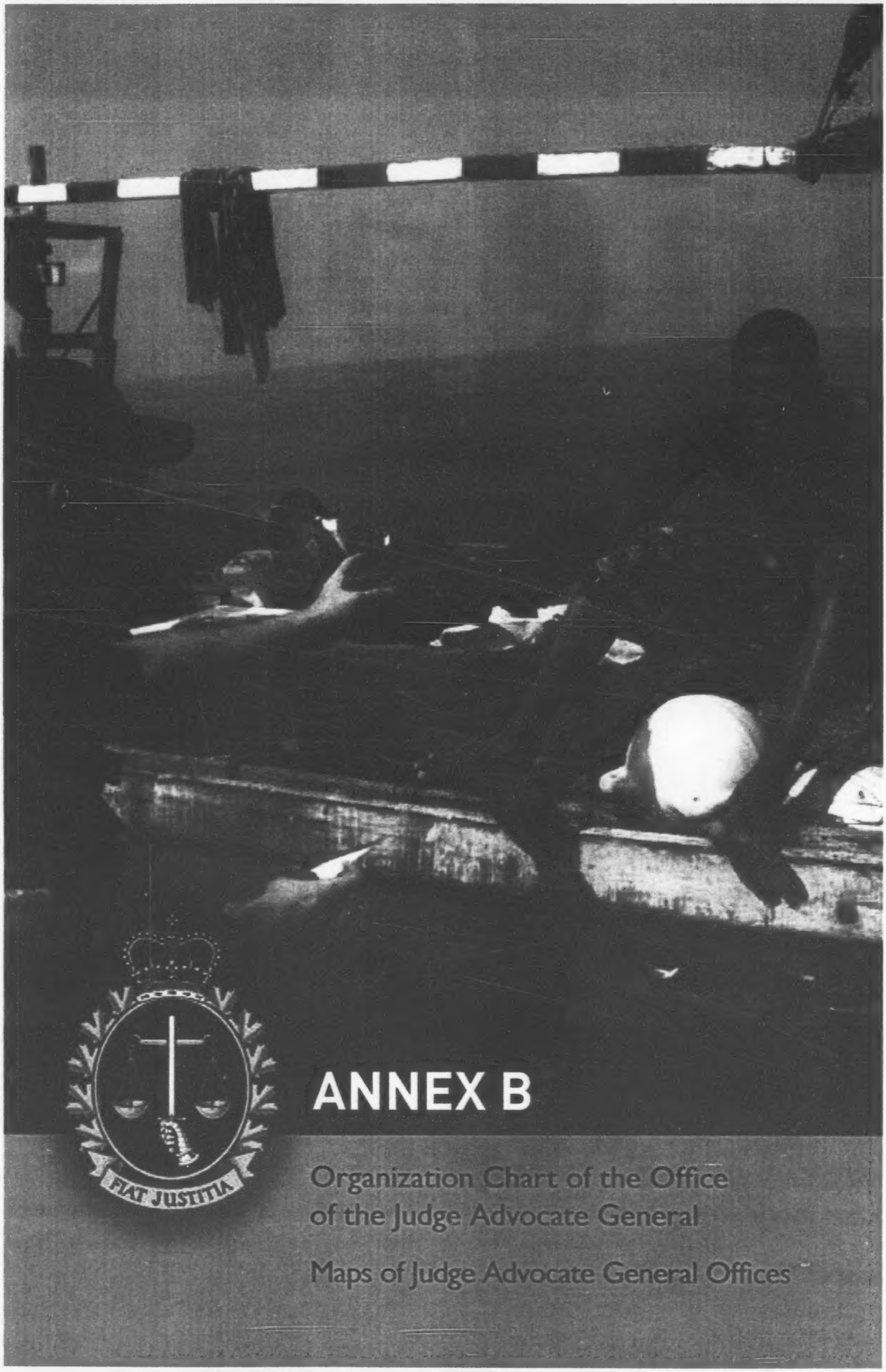


ANNEX A

Organization Chart Displaying the Relationship of the Judge Advocate General to the Minister, the Chief of the Defence Staff and the Deputy Minister


Minister National Defence
Communications Security Establishment
Ombudsman
National SAR Secretariat
Chief Military Judge
CF Grievance Board
Mil Police Complaints Com
Deputy Minister National Defence
Chief of the Defence Staff
Judge Advocate General
Assistant Deputy Minister (Finance & Corporate Services)
Assistant Deputy Minister (Policy)
Vice Chief of the Defence Staff
Chief of the Maritime Staff
Assistant Deputy Minister (Infrastructure & Environment)
Assistant Deputy Minister (Materiel)
Assistant Deputy Minister (Science & Technology)
Assistant Deputy Minister (Public Affairs)
Chief of the Land Staff
Assistant Deputy Minister (Information Management)
Chief Review Services
Chief of the Air Staff
Assistant Deputy Minister (Human Resources - Civilian)
DND/CF Legal Advisor
Chief of Military Personnel
Commander Canada Command
Commander Canadian Expeditionary Force Command
Commander Canadian Special Operations Forces Command
Commander Canadian Operational Support Command

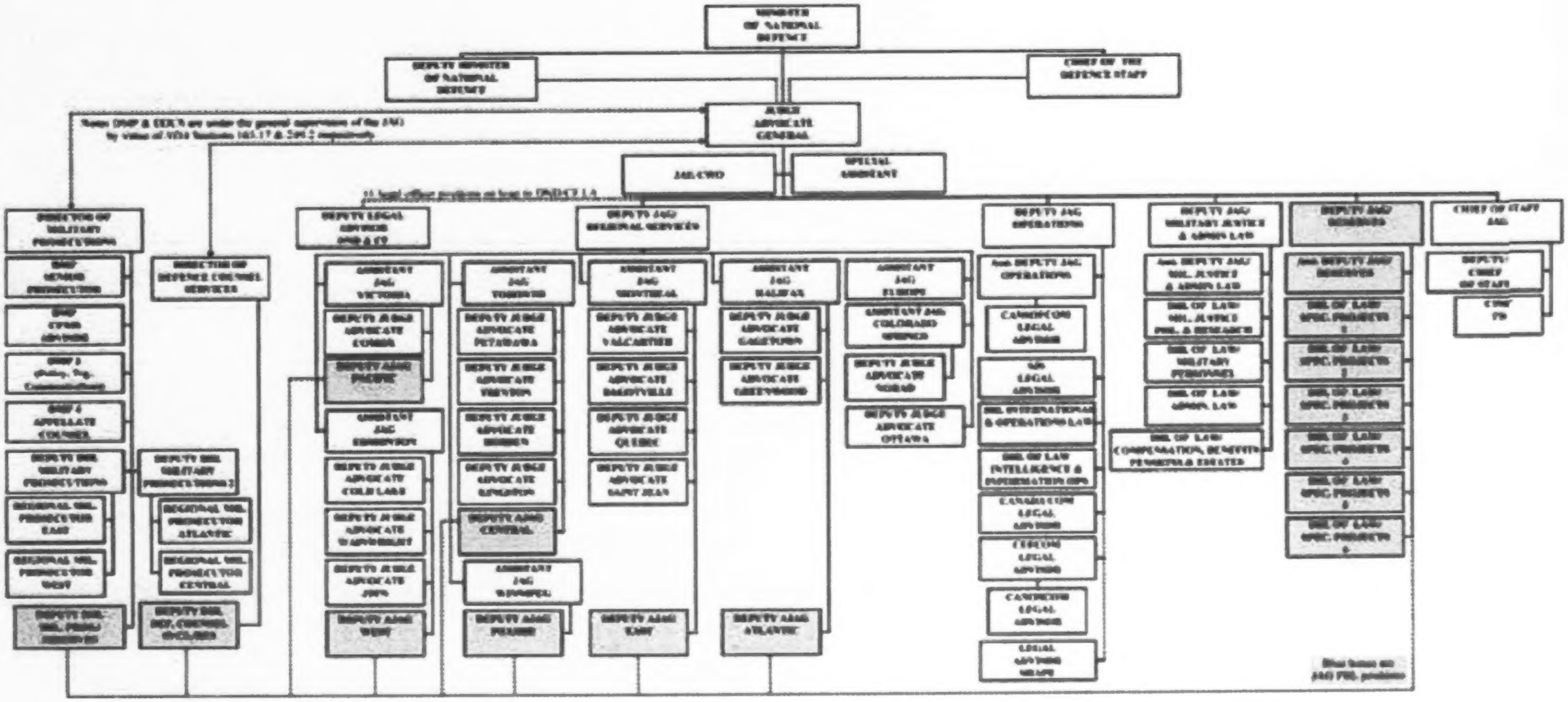
NOTE: CMS, CLS, CAS and CMP are also Commanders of Maritime, Land Force, Air and Military Personnel Commands respectively.



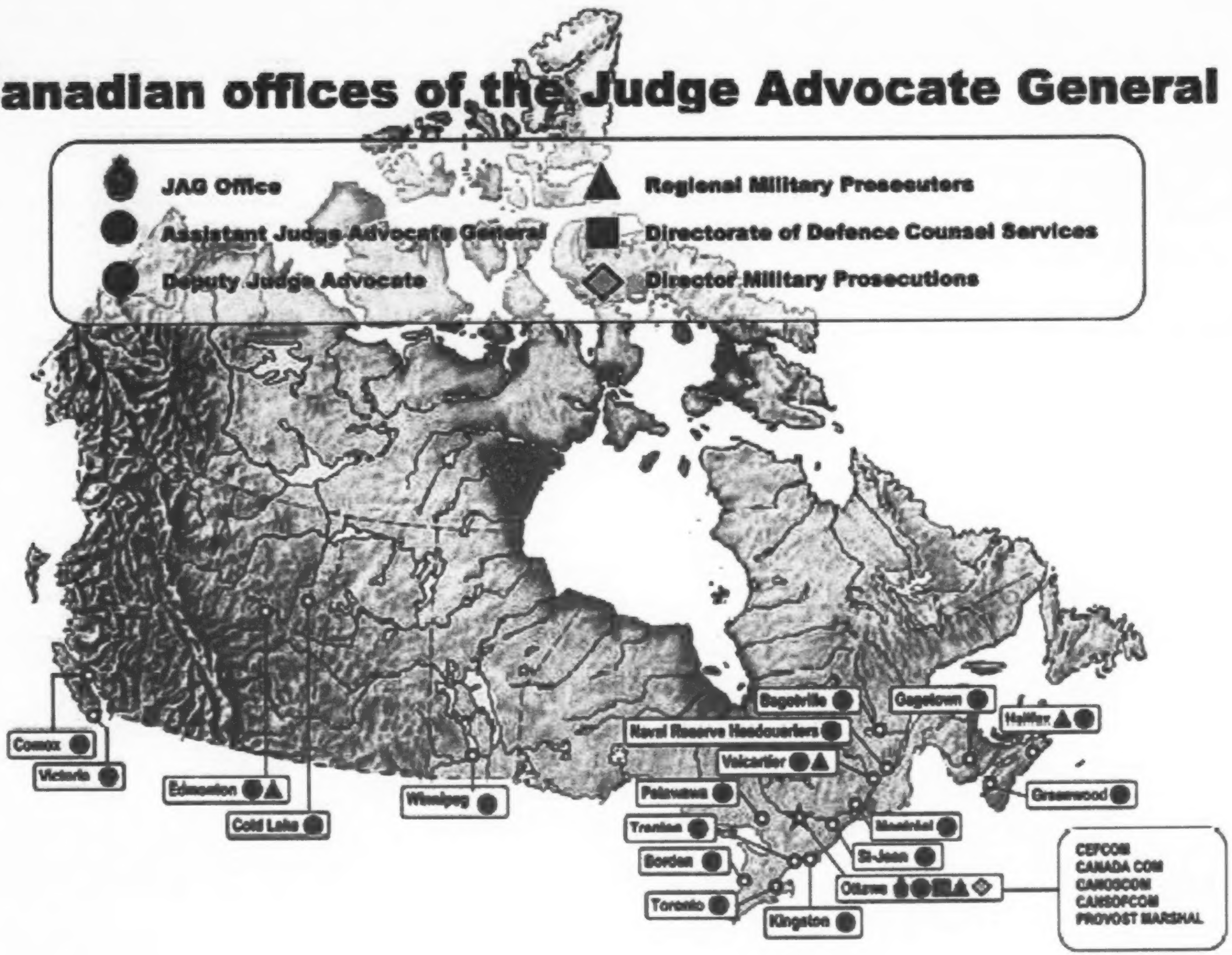
ANNEX B

Organization Chart of the Office of the Judge Advocate General

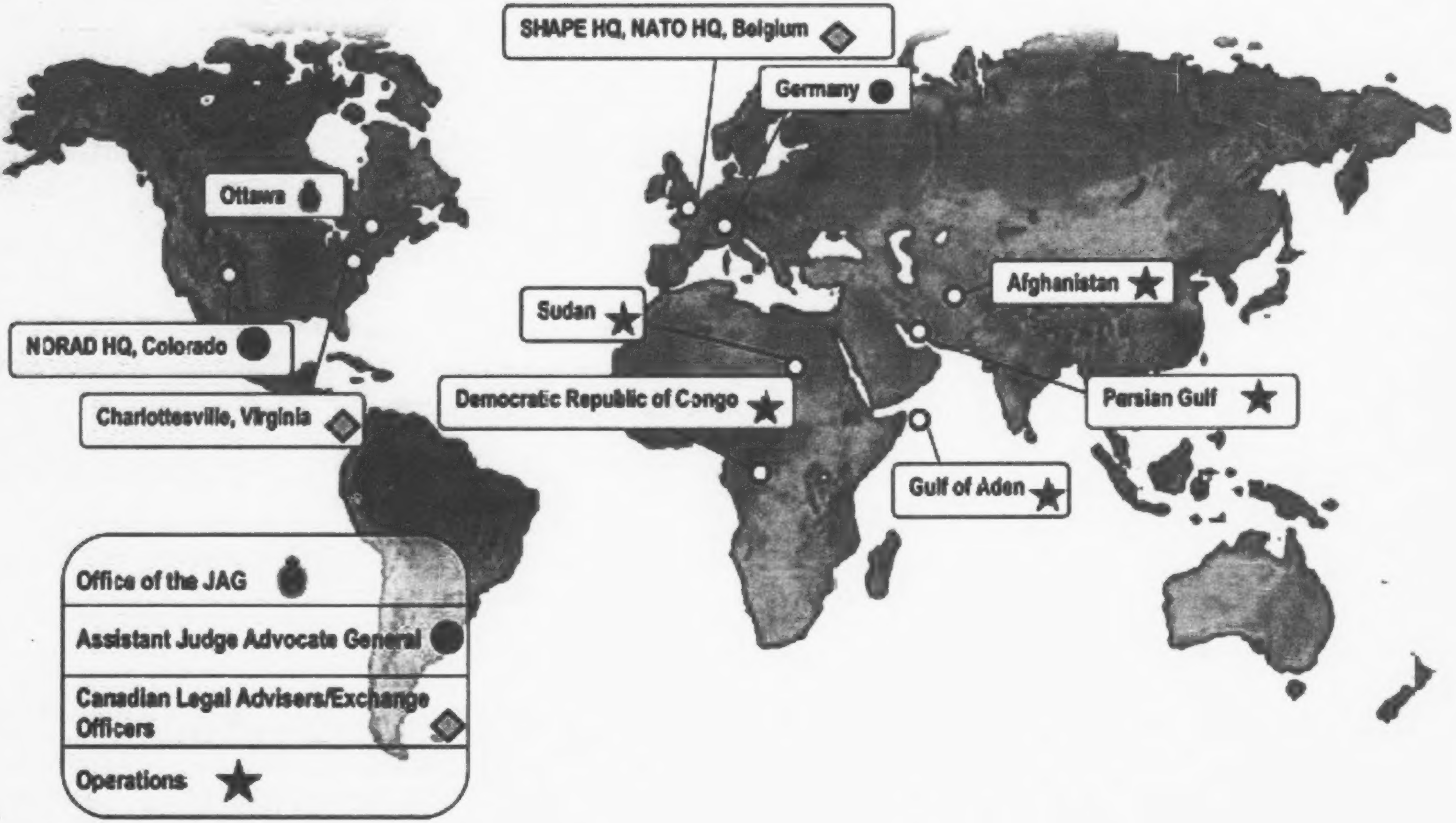
Maps of Judge Advocate General Offices

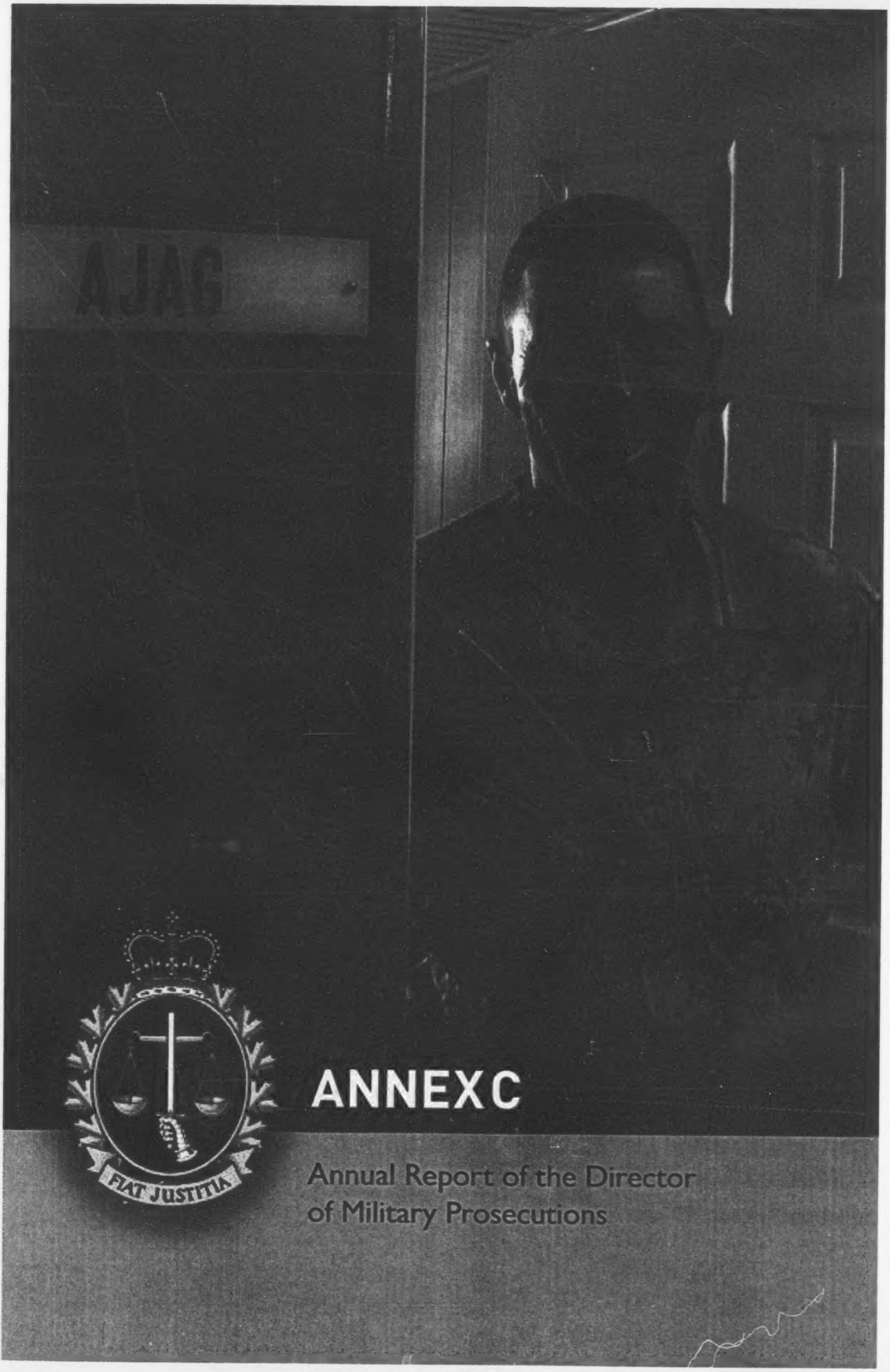

MINISTER OF NATIONAL DEFENCE
DEPUTY MINISTER OF NATIONAL DEFENCE
CHIEF OF THE DEFENCE STAFF
JUDGE ADVOCATE GENERAL
JAG CWO
SPECIAL ASSISTANT
DIRECTOR OF MILITARY PROSECUTIONS
DIRECTOR OF DEFENCE COUNSEL SERVICES
DEPUTY LEGAL ADVISOR DND & CF
DEPUTY JAG REGIONAL SERVICES
DEPUTY JAG OPERATIONS
DEPUTY JAG MILITARY JUSTICE & ADMIN LAW
CHIEF OF STAFF JAG
ASSISTANT JAG VICTORIA
ASSISTANT JAG TORONTO
ASSISTANT JAG MONTREAL
ASSISTANT JAG HALIFAX
ASSISTANT JAG EUROPE
DEPUTY JUDGE ADVOCATE VALCARTIER
DEPUTY JUDGE ADVOCATE QUEBEC
DEPUTY JUDGE ADVOCATE OTTAWA
DEPUTY JUDGE ADVOCATE NORAD
ASSISTANT JAG COLORADO SPRINGS
Asst. DEPUTY JAG OPERATIONS
DIR. INTERNATIONAL & OPERATIONS LAW
DIR. OF LAW INTELLIGENCE & INFORMATION OPS
DIR. OF LAW COMPENSATION, BENEFITS PENSIONS & ESTATES
DIR. OF LAW MILITARY PERSONNEL
DIR. OF LAW ADMIN. LAW
DEPUTY CHIEF OF STAFF

Canadian offices of the Judge Advocate General


JAG Office
Assistant Judge Advocate General
Deputy Judge Advocate
Regional Military Prosecutors
Directorate of Defence Counsel Services
Director Military Prosecutions
Comox
Victoria
Edmonton
Cold Lake
Winnipeg
Bagotville
Gagetown
Halifax
Naval Reserve Headquarters
Valcartier
Petawawa
Greenwood
Trenton
Montréal
Borden
St-Jean
Ottawa
Toronto
Kingston
CEFCOM
CANADA COM
CANOSCOM
CANSOFCOM
PROVOST MARSHAL

Offices of the Judge Advocate General outside Canada


SHAPE HQ, NATO HQ, Belgium ◆
Germany ●
Ottawa
Afghanistan ★
Sudan ★
NORAD HQ, Colorado ●
Democratic Republic of Congo ★
Persian Gulf ★
Charlottesville, Virginia ◆
Gulf of Aden ★
Office of the JAG
Assistant Judge Advocate General ●
Canadian Legal Advisers/Exchange Officers ◆
Operations ★



ANNEX C

Annual Report of the Director of Military Prosecutions

Section 1 Introduction

This report, covering the period of 1 April 2008 to 31 March 2009, is prepared in accordance with the article 110.11 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), which requires the Director of Military Prosecutions[1] (DMP) to report annually to the Judge Advocate General (JAG) on the execution of her duties and functions.[2] This report includes the following subjects:

- The Canadian Military Prosecution Service's (CMPS) Role, Organization and Personnel
- Training and Policy Development
- Military Justice Proceedings: Trials, Appeals and Other Hearings

Section 2 The DMP and the CMPS

Role of DMP

The DMP is appointed by the Minister of National Defence. While she acts under the general supervision of the JAG, she exercises her duties and functions independently.[3] Some of these duties and functions are noted below:

- Reviewing all *Code of Service Discipline* charges referred to her through the Canadian Forces (CF) chain of command and determining whether:
    - The charges or other charges founded on the evidence should be tried by court martial; or
    - The charges should be dealt with by an officer who has jurisdiction to try the accused by summary trial.
- Conducting – within Canada or at deployed locations overseas – the prosecution of all charges tried by court martial.

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[1] The DMP is Captain (N) M.H. MacDougall, who was appointed on 16 January 2005 and re-appointed on 16 January 2009.

[2] Previous DMP Annual Reports, along with copies of DMP Policy Directives and other information can be found at: www.forces.gc.ca/jag/publications.

[3] The duties and functions of the DMP are set out in the *National Defence Act*, the QR&O, ministerial orders and various agreements.

- Acting as appellate counsel for the Minister of National Defence on all appeals from courts martial.
- Acting as the representative of the CF at all custody review hearings and before other boards and tribunals whose jurisdiction touches upon matters relevant to the military justice system.
- Providing legal advice to military police personnel assigned to the Canadian Forces National Investigation Service (CFNIS).

Organization of the CMPS

The DMP is assisted in her duties and functions by regular and reserve force military prosecutors, along with civilian paralegals and support staff. The service is organized regionally, and consists of:

- CMPS headquarters at National Defence Headquarters in Ottawa consisting of the DMP, two Deputy Directors of Military Prosecutions (DDMP), an appellate counsel, one staff prosecutor responsible for communications, training and policy development as well as legal advisor working directly with the CFNIS;
- Regional Military Prosecutors' (RMP) offices, each established for two regular force prosecutors, located at:
    - Halifax, Nova Scotia (Atlantic Region)
    - Valcartier, Quebec (Eastern Region)
    - Ottawa, Ontario (Central Region)
    - Edmonton, Alberta (Western Region)
- Reserve force prosecutors located individually across Canada.

Communications are of vital importance to an organization like CMPS, particularly given the geographic dispersal of CF military prosecutors. To ensure that all prosecutors remain aware of the progress of individual disciplinary files, DMP updates and distributes several internal reports on a weekly basis. The DMP also convenes regular conference calls among the prosecutors to provide direction and discuss matters of common interest. On the completion of each court martial, the trial prosecutor provides all other prosecutors with a summary sheet outlining the results of the case and the reasons provided by the military judge. Continuous individual contact is maintained by the DMP and DDMPs with military prosecutors and key civilian staff.

CMPS Personnel

During the reporting period, the CMPS experienced a number of personnel and position changes both at CMPS headquarters as well as at the various RMP offices located across the country. At the CMPS headquarters, two positions were created - an additional DDMP position and an embedded prosecutor position. Also, one of the staff prosecutor positions was eliminated.

Legal officers new to the CMPS filled both the additional positions of DDMP and CFNIS legal advisor. Further, the remaining staff prosecution position was filled in April.

Finally, the legal officer in the original DDMP position was deployed in January as legal advisor to the United Nations Mission in the Sudan. This required the prosecutor in the appeals position to fill one of the DDMP positions in an acting capacity.

The following staff changes occurred in the various RMP offices:

- a new prosecutor to RMP Atlantic in September;
- a new prosecutor to RMP Eastern in November;
- the legal officer originally in the staff prosecutor position that was eliminated at CMPS headquarters was posted to RMP Central in July;
- one of the prosecutors at RMP Central was seconded to the Ontario Crown in Ottawa for one year beginning in February; and
- two prosecutors were posted to RMP Western in June and July.

Insofar as civilian staff are concerned, at CMPS headquarters both the administrative assistant and the court martial paralegal took maternity leave and those positions are currently being filled by individuals in an acting capacity. Also at CMPS headquarters, the individual in the appeals paralegal position left CMPS and this position is also being filled by an individual in an acting capacity. In the RMP offices, the administrative assistant for RMP Central left CMPS and this position has since been filled. Finally, at RMP Atlantic, the administrative assistant position was filled throughout the reporting period with several individuals on a casual basis until September when an individual was seconded from the Federal Department of Justice to fill the position on a more permanent basis.

Section 3 Training and Policy Development

Training

All regular force prosecutors are military legal officers who are posted to their positions for a limited period of time – usually three to five years. As such, the training that they receive must support both their current employment as prosecutors as well as their professional development as officers and lawyers. The relative brevity of a military prosecutor's posting with the CMPS requires a significant and ongoing organizational commitment to providing him or her with the formal training and practical experience necessary to develop the skills, knowledge and judgment essential in an effective prosecutor.

Given the small size of the CMPS, much of the required training is provided by organizations external to the CF. During the present reporting period, CMPS prosecutors participated in conferences and continuing legal education programs organized by federal, provincial and territorial Heads of Prosecution, the International Society for the Reform of Criminal Law, the Canadian Bar Association and its provincial affiliates, the Advocate's Society, the National Criminal Law Program, the Ontario Crown Attorneys Association and various provincial law societies. These programs benefited the CF not only through the knowledge imparted or skills developed but also through the professional bonds forged by individual military prosecutors with their colleagues from the provincial and federal prosecution services.

Also, in an effort to increase professional interaction among military prosecutors, CMPS held its annual workshop on 25 October 2008 in Ottawa, Ontario. It was attended by regular and reserve force prosecutors and focused on current issues such as updates on significant cases and proceedings in the military justice system. In the course of discussions chaired by DMP the participants were also encouraged to express their views on various prosecution policy related matters.

From 15 to 18 April 2008 DMP co-hosted the 35th Conference of the Federal, Provincial and Territorial Heads of Prosecutions Committee in Ottawa. The conference covered an array of topics related to prosecutions. It also provided an opportunity for the various heads of prosecutions across the country to witness a series of military demonstrations and briefings. The responses from the various heads of prosecutions confirmed that the conference was a tremendous success.

In addition to the above noted training, all available military prosecutors are also required to attend the annual JAG continuing legal education workshop as well as to maintain their readiness to deploy into a theatre of operations in support of DMP's mandate by conducting individual military skills training such as weapons familiarization and first aid training.

A hardworking and highly motivated civilian support staff is an integral part of the CMPS team and provides a most important service in the carrying out of the prosecutorial function. As a result, significant efforts are also made to provide these individuals with training and experiences that will enhance their value to CMPS and to the Department of National Defence.

CMPS also provides support to the training activities of other CF entities. During the present reporting period, this support included the mentoring and supervision by military prosecutors of a number of junior military lawyers from the Office of the Judge Advocate General, who completed a portion of their "on the job training" program by assisting in the prosecution at courts martial. Military prosecutors also provided presentations to JAG legal officers, military justice training to members of the CFNIS, served as supervisors for law students articling with the Office of the JAG and acted as instructors during a week-long Legal Officer Intermediate Training course in military justice.

Policy Development - Court Martial Delay Initiative

In the course of the previous reporting period, the DMP contracted with two external civilian consultants to conduct a review of the CMPS in order to identify those factors that contribute to delay in the military justice system and to make recommendations about what CMPS could do to reduce those delays.

One of the key conclusions of the review was that delay in the military justice system is caused by the policies and practices rather than by a lack of adequate resources. Accordingly, a number of recommendations were made to assist in reducing overall delay, including a comprehensive review and redrafting of the policies and procedures of the CMPS.

In response to these recommendations, CMPS amended several of its policies that have a direct impact on delay in the military justice system. Specifically, the amended policies set out concrete timelines for file movement at the pre-charge screening and post-charge review stages and amended the practices and procedures in place for engaging in resolution discussions with defence counsel and CMPS interactions with the CFNIS as well as unit legal advisors and the chain of command.

The amended policies adopted a 30-day target to complete post-charge reviews, which reflected the practices adopted earlier this year. Although there is limited data to draw any definitive conclusions on whether this has had an impact on reducing court martial delay, it can be seen that there is a general trend towards reducing the time between receiving an application for disposal of a charge and a decision being taken on whether to prefer a charge as well as the time between receiving an application for disposal of a charge and completion of court martial over the past few reporting periods. (See Figure 1).

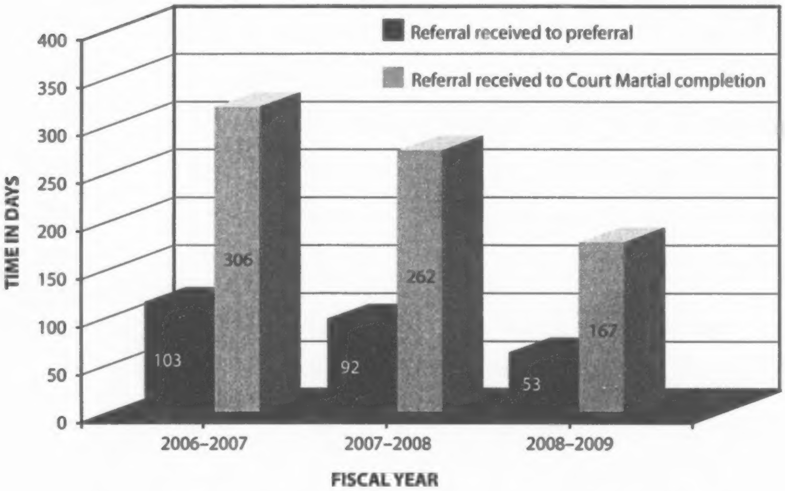

Figure 1: Historical Trends in Court Martial Delay[4]

Further, CMPS adopted several recommendations for:

- the creation of an embedded prosecutor position with the CFNIS to provide legal and practical advice at the investigative stage;
- the creation of an additional DDMP to participate in courts martial and act as a mentor to junior military prosecutors;
- the secondment of a prosecutor to work for twelve months in a civilian prosecution service to gain experience in court; and

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[4] The statistics for "Referrals received to preferral" in fiscal year 2008/2009 only account for those referrals that have been received and preferred at the time of this report. It does not account for those cases that have been referred but have yet to be preferred.

- the opportunity for unit legal advisors to participate as co-counsel with RMPs at courts martial in order to contribute to the professional development of unit legal advisors as well as to improve the quality of prosecutions through greater local situational awareness.

Although there are indications that the adoption of these recommendations has already produced short-term results in reducing court martial delay, DMP is continuing to work towards adopting those remaining recommendations that have yet to be implemented. To these ends, DMP is in the process of conducting a comprehensive review of all CMPS policies and procedures, working with the CFNIS to create a standardized electronic disclosure package, and renegotiating a service level agreement with the CFNIS in an attempt to reduce overall court martial delay.

Section 4 Military Justice Proceedings

The nature of the operational tasks entrusted to the CF requires the maintenance of a high degree of discipline among CF members. Parliament and the courts have long recognized the importance of a separate military *Code of Service Discipline* to govern the conduct of CF members and prescribe punishment for disciplinary breaches.

The *Code of Service Discipline* is designed to assist commanders in the promotion and maintenance of good order, high morale, efficiency, discipline and operational effectiveness. To these ends the *Code of Service Discipline* creates a structure of military tribunals as the ultimate means of enforcing discipline. Among these tribunals are the courts martial and the Court Martial Appeal Court of Canada (CMAC).

During the present reporting period, military prosecutors represented the interest of the CF in a number of different types of judicial proceedings related to the military justice system. These proceedings included courts martial, appeals from courts martial and reviews of pre-trial custody.

R.v. Trépanier

On 24 April 2008 the CMAC handed down its decision in the case of *R. v. Trépanier*. Although the details of this appeal are set out in the appeal section of this report, it is important to highlight this decision in the current section as it provides the necessary context when reviewing the statistics related to courts martial and backlog.

In *Trépanier*, the Court struck down those sections of the *National Defence Act* that gave the DMP authority to choose the type of court martial to try an accused and for the court martial administrator to convene a court martial in accordance with the decision of the DMP. As a result, from 24 April 2008 to 13 August 2008 the court martial administrator did not convene any new courts martial and also sent back 25 cases to DMP that were preferred but not yet convened as the accused was not provided with the opportunity to select the type of court martial.[5]

Further, although those courts martial that were already convened or commenced prior to 24 April 2008 continued, there were no courts martial held from 19 June 2008 until 20 August 2008.[6] This hiatus in courts martial coupled with the inability of the court martial administrator to convene courts martial until the passage of Bill C-60 resulted in a significant backlog of cases during the reporting period.

Courts Martial

During the reporting period, the DMP received 90 applications for disposal of a charge or charges from various referral authorities. (See Figure 2).

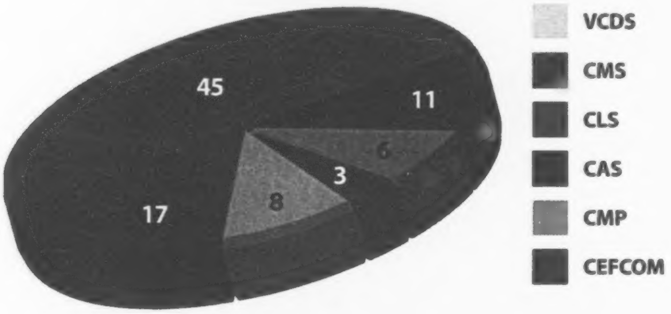

Figure 2: Referrals by Command of Referral Authority[7]

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[5] On 19 June 2009, Bill C-60, An Act to amend the National Defence Act (court martial) and to make consequential amendment to another Act received royal assent. According to Bill C-60 the court martial administrator could convene courts martial and select the type of court martial by operation of law. Once Bill C-60 came into force and cases were preferred the court martial administrator began once again to convene courts martial.

[6] On 24 April 2008, there were five courts martial that were already commenced and 17 cases that had already been convened but not yet commenced. The majority of these cases proceeded. As of 19 June 2008, there were no longer any convened cases that could proceed by court martial.

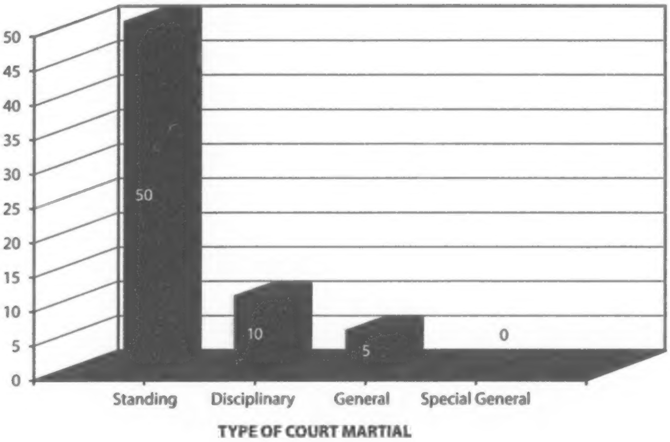
[7] Both SOFCOM and CANOSCOM did not have any referrals during the reporting period.

Following review by military prosecutors, charges were preferred to court martial in respect of 97 applications.[8] In 16 of those cases, charges were withdrawn after they had been preferred but before trial. A decision to not prefer any charges was made in respect of 36 applications.

During the reporting period, a total of 187 charges were tried before 65 courts martial.[9]

Despite the number of courts martial completed during the reporting period, the backlog of cases awaiting trial remains significant. As of 31 March 2008, 12 courts martial had been convened but not yet commenced and charges in 23 cases had been preferred and were awaiting the assignment of a military judge and the convening of a court martial. This total of 35 cases awaiting completion compares to 52 cases awaiting completion on 31 March 2007 and represents a decrease of 32 percent from 2007 to 2008. However, the backlog of cases awaiting trial continues to be a significant factor and further steps for reducing this number are being explored.

During the reporting period, 50 trials were held before a Standing Court Martial. There were 10 trials held before a Disciplinary Court Martial and five trials held before a General Court Martial.[10] (See Figure 3).



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[8] This includes 19 cases that were re-preferred as a result of the CMAC decision in *R. v. Trépanier.*

[9] In this reporting period there were two joint trials so there were 65 courts martial for 67 accused.

[10] On 19 June 2008 the *National Defence Act* was amended, when Bill C-60 received royal assent, whereby the court martial structure was simplified by reducing the types of court martial from four to two. Both the Disciplinary Court Martial and the Special General Court Martial were eliminated and neither of these types of courts martial were held after this date.

Figure 3: Type of Court Martial Trying Accused

At the conclusion of 52 of the trials, the trier of fact made a finding of guilty in respect of at least one charge.[11] (See Figure 4).

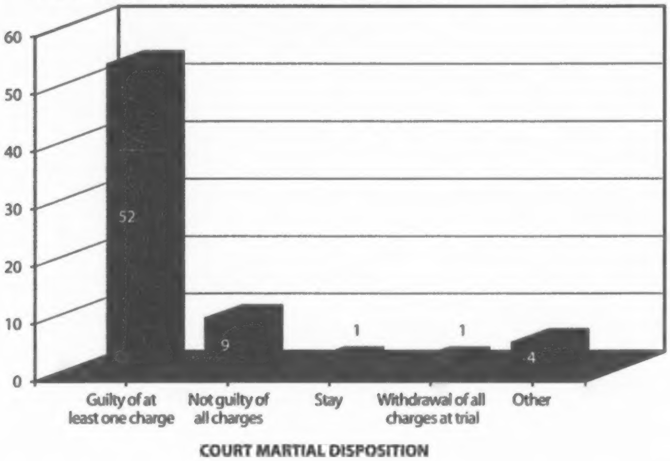

Figure 4: Court Martial Disposition[12]

The one case that resulted in the withdrawal of all charges was that of Master Corporal Fraser. MCpl Fraser was charged by the CFNIS with one count of manslaughter while using a firearm and one count of negligent performance of a military duty both in relation to the death of MCpl Walsh on 9 August 2006. The charges were preferred for court martial on 12 October 2007 and were set down for trial commencing 14 October 2008.

On 11 October 2008, the defence provided new information to the prosecution who then determined that there was no longer a reasonable prospect of conviction. The charges against MCpl Fraser were subsequently withdrawn at trial.

The one case that resulted in a stay was that of Cpl Liwyj. The stay was successfully appealed and a new trial has been ordered.

While only one sentence may be passed on an offender at a court martial, a sentence may involve more than one punishment. The 52 sentences pronounced by courts martial during the reporting period involved 90 punishments. A fine was the most common punishment, with 40

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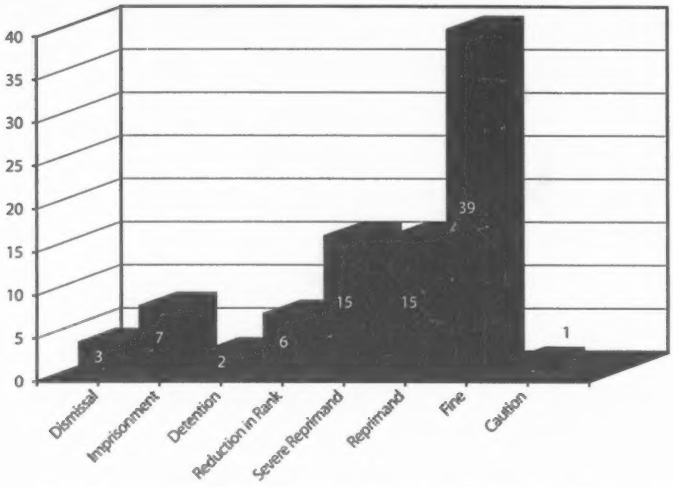
[11] In this reporting period there were two joint trials for four accused resulting in four findings made at two courts martial.

[12] Annexes A and B provide additional information regarding the charges tried and the results of each court martial.



fines being imposed. Seven punishments of imprisonment and two punishments of detention were imposed by the court. (See Figure 5).

Figure 5: Punishments Awarded

A military judge heard three applications for release pending appeal in the cases where a custodial sentence was imposed. Release pending appeal was granted for two of these applications.

Appeals

At the start of the reporting period, ten appeals were ongoing with nine of these appeals initiated by convicted members. During the reporting period, 16 appeals were initiated, three of them by Her Majesty. Of these 26 cases on appeal during the reporting period, four have been dismissed, including three for failure by the appellants to file their factums. Three cases were also abandoned by the appellant. The CMAC held oral hearings in respect of nine of these appeals and rendered a decision in nine. We are awaiting decisions in three of these appeals and the remaining seven appeals have not yet been argued.

Annex C provides additional information regarding the types of appeal and the progress of each appeal.

R. v. Trépanier

OCdt Trépanier challenged the constitutionality of section 165.14 and subsection 165.19(1) of the *National Defence Act* as well as article 111.02 of the QR&O seeking a declaration that these provisions were invalid and inoperative. Section 165.14 instructed the Director of Military Prosecutions to determine the type of Court Martial and subsection

165.19(1) of the *National Defence Act* as well as QR&O article 111.02 instructed the Court Martial Administrator to convene a court martial in accordance with the determination made by the DMP. Trépanier argued that these provisions breached his right to a fair trial protected by section 7 of the *Charter* and that the right to choose the trier of fact should rest with the accused.

On 15 February 2008, MCpl McRae and Ex-Cpl Beek were granted intervenor status in this case due to similar issues being raised at their Courts Martial. On 17 March 2008 MCpl McRae abandoned his appeal.

On 24 April 2008, the CMAC held that the exclusive power of the DMP to unilaterally choose the type of court martial violated the accused constitutional right to full answer and defence and to control the conduct of that defence. The Court struck down section 165.14, subsection 165.19(1) of the *National Defence Act* and article 111.02 of the QR&O.

The CMAC did not provide a remedy for OCdt Trépanier, but did recommend a remedy for Ex-MCpl Beek. The CMAC recommended that his conviction, sentence, and convening order be quashed and that a new trial be ordered giving the accused the right to choose the type of court martial.

On 30 May 2008, the DMP filed a Notice of Application for Leave to Appeal along with a Motion for a Stay of Execution of the judgment requesting an expedited hearing on the matter with the Supreme Court of Canada. The stay was sought in order to permit the military justice system to continue to function while the appeal process was being pursued. Simultaneously, the Office of the Judge Advocate General assembled a team to explore possible legislative and regulatory amendments to the *National Defence Act* and the QR&O. Two prosecutors with CMPS were tasked to work with the legislative and regulatory response team for a period of approximately two months.

The application for stay of execution was abandoned on 19 June when Bill C-60, *An Act to amend the National Defence Act (court martial) and to make consequential amendment to another Act* received royal assent. Pursuant to Bill C-60, the selection of the type of court martial is now governed by operation of law, enabling an accused person to make a choice as to the mode of trial in specified circumstances. Additionally, the court martial structure was simplified by reducing the types of court martial from four to two.

On 25 September 2008, leave to appeal was denied by the Supreme Court without reasons.

R. v. Couture

This matter arose out of the decision at court martial not to proceed with the trial of Sgt Couture since the charge layer had not complied with the requirement of QR&O article 107.03 to obtain legal advice before laying charges for offences under the *Code of Service Discipline*. The military judge ruled that by neglecting to read the legal advice provided, the charge layer rendered the Record of Disciplinary Proceedings a nullity.

DMP filed a Notice of Appeal with the CMAC, appealing the legality of the decision to terminate proceedings on all charges against the accused. In a unanimous judgment, the appeal was allowed and a new trial was ordered. The CMAC ruled that the only document the military judge had to refer to in order to pronounce a judgment was the charge sheet signed and provided to him by DMP.

Because Sgt Couture was charged with relatively minor insubordination offences that took place in 2005, and considering that he had since been released from the CF, DMP decided not to proceed further with these charges.

R. v. Billard

This matter arose out of the conviction of MCpl Billard for neglect to the prejudice of good order and discipline at Court Martial on 6 July 2007. MCpl Billard failed to don his helmet and flak vest contrary to a standing order and remained in bed while his forward operating base in Afghanistan was under direct attack. The accused pleaded guilty to the charge and the military judge sentenced him to detention for a period of 21 days.

MCpl Billard appealed the severity of his sentence to the CMAC. In a unanimous judgment the appeal was dismissed. The CMAC ruled that the sentence of detention was neither illegal nor demonstrably unfit in the circumstances of this case. MCpl Billard's failure to perform as a member of a fighting unit, which was then under attack, put at risk the lives and safety of himself and his comrades. In such circumstances, lawful orders must be unquestioningly obeyed.

Other Hearings

Custody Reviews

Military judges are, in certain circumstances, required to review orders made to retain a CF member in service custody. DMP may represent the interest of the CF at such hearings. During the reporting period, military prosecutors appeared at three pre-trial custody review hearings. In these cases the person in custody was released upon giving an undertaking to comply with certain conditions set by the military judge.

Ex-Master Corporal Matchee

On 25 April 1994, the then Chief Military Judge presiding at a Standing Court Martial declared Ex-MCpl Matchee unfit to stand trial for the death of Shidane Abukar Arone, a Somalian teenager, in March 1993. Every 2 years since this original finding, the prosecution has been required to demonstrate that there remains sufficient evidence to try Ex-MCpl Matchee of the offences charged. The most recent biennial hearing was scheduled for 16 September 2008.

Parallel to the Court Martial proceedings, the Saskatchewan Review Board reviewed the situation of Ex-MCpl Matchee and conducted a hearing to determine if he remained unfit to stand trial every six months. The Saskatchewan Review Board has in previous dispositions indicated that Mr. Matchee would never be fit to stand trial on the outstanding charges.

In September 2008, the DMP concluded that the public interest, including the interests of the CF, did not require that the prosecution against Ex-MCpl Matchee be continued. This conclusion was based on the fact that the offences took place more than 15 years ago, that Ex-MCpl Matchee would never be legally fit to answer the charges and that there was no evidence that he posed a significant risk to the community if charges were withdrawn. Consequently, DMP withdrew the outstanding charges against Ex-MCpl Matchee, bringing a prosecution that has been ongoing for 15 years to an end.

Conclusion

DMP Comments

This has been a year of challenges and uncertainty for the military justice system. The decision by the CMAC in *R v. Trépanier* to strike down the sections of the *National Defence Act* that gave DMP the authority to choose the type of court martial and the Court Martial Administrator to convene a court martial resulted in an unexpected and significant interruption in courts martial proceedings. I was concerned that this disruption would further exacerbate the problem with respect to timeliness of the court martial system identified in last year's annual report.

Fortunately, I am pleased to note that this was not the case. In fact this was a year where we observed a marked improvement from previous years in terms of timelines from referral to court martial completion. The reasons for this progress are numerous but primary among them are the adoption and implementation of many of the recommendations made in the review conducted last year of CMPS by two very experienced former Crown Attorneys and the hard work and dedication by all members of the CMPS team in implementing these changes.

ANNEX C | **ANNEX A**

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
1	DCM	Abu-Ghosh, Capt	125 (a)	Wilfully (or negligently) made a false entry	Terminated	N/A	N/A	CFB Trenton	8 Wing Trenton	VCDS	English
			125 (a)	Wilfully (or negligently) made a false entry	Terminated						
			125 (a)	Wilfully (or negligently) made a false entry	Terminated						
			125 (a)	Wilfully (or negligently) made a false entry	Terminated						
			125 (a)	Wilfully (or negligently) made a false entry	Terminated						
			125 (a)	Wilfully (or negligently) made a false entry	Terminated						
			125 (a)	Wilfully (or negligently) made a false entry	Terminated						
			125 (a)	Wilfully (or negligently) made a false entry	Terminated						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
2	SCM	Belanger, Sgt	130 (266 CCC)	Assault	Withdrawn	Severe Reprimand $2000 fine	N/A	Asticou, Gatineau	Afghanistan	VCDS	English
			129	Neglect to the prejudice of good order and discipline	Withdrawn						
			130 (267(b) CCC)	Assault causing bodily harm	Withdrawn						
			129	Neglect to the prejudice of good order and discipline	Guilty						
3	SCM	Benoit, Capt	125 (a)	Wilfully (or negligently) made a false entry	Not Guilty	N/A	N/A	Montreal	Garnison Montreal	CLS	French
			125 (a)	Wilfully (or negligently) made a false entry	Not Guilty						
			130 (380 CCC)	Fraud	Not Guilty						
			117 (f)	An act of fraudulent nature	Not Guilty						
4	DCM	Bergeron, Pte	127	Injurious or destructive handling of dangerous substances	Guilty	$500 fine	N/A	Valcartier	Valcartier	CLS	French
			129	Neglect to the prejudice of good order and discipline	Not Guilty						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
5	SCM	Bradt, POI	112	Used a vehicle of the CF for an unauthorized purpose	Stay	Severe reprimand and $3000 fine	N/A	Valcartier	Ottawa, ON	SOFCOM	English
			130 (122 CCC)	Breach of public trust by public officer	Guilty						
			117(f)	An act of fraudulent nature	Stay						
			130 (122 CCC)	Breach of public trust by public officer	Guilty						
			117(f)	An act of fraudulent nature	Not Guilty						
			130 (122 CCC)	Breach of public trust by public officer	Not Guilty						
			129	Conduct to the prejudice of good order	Not Guilty						
6	SCM	Brisson, Ex-Pte	130 (5(2) CDSA)	Possession for the purpose of trafficking	Terminated	N/A	N/A	CFB Gagetown	CFB Gagetown	CLS	English
			130 (4(1) CDSA)	Possession of substances	Terminated						
			129	Conduct to the prejudice of good order and discipline	Terminated						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
7	SCM	Buck, Cpl	130 (368 CCC)	Uttering a forged document	Stayed	Severe reprimand $2400 fine	N/A	Gagetown	Oromocto, NB	CMP	English
			117 (f)	An act of fraudulent nature	Guilty						
			130 (368 CCC)	Uttering a forged document	Stayed						
			117 (f)	An act of fraudulent nature	Guilty						
			125 (a)	Wilfully (or negligently) made a false entry	Guilty						
8	SCM	Camirand, Capt	125(a)	Wilfully (or negligently) made a false entry	Guilty	Reprimand and $500 fine	N/A	Thunder Bay	Thunder Bay	ADM(IM)	English
9	SCM	Carlson, Ex-POI	130 (5(I) CDSA)	Trafficking of substances	Withdrawn	Dismissal from the CF, reduction in rank, and $2000 fine	N/A	Esquimalt	Victoria, BC	CMS	English
			93	Cruel or disgraceful conduct	Withdrawn						
			129	Conduct to the prejudice of good order and discipline	Guilty						
10	SCM	Carreau-Lapointe, Pte	124	Negligent performance of a military duty	Guilty	Severe reprimand and $1000 fine	N/A	CFB Bagotville	CFB Bagotville	CLS	French
			124	Negligent performance of a military duty	Guilty						
			124	Negligent performance of a military duty	Guilty						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
11	GCM	Clarke, Capt	83	Disobeying a lawful command	Withdrawn	Severe reprimand and $5000 fine	N/A	Kingston, ON	Kandahar, Afghanistan	CEFCOM	English
			129	An act to the prejudice of good order and discipline	Guilty						
			124	Negligent performance of a military duty	Withdrawn						
			124	Negligent performance of a military duty	Withdrawn						
			124	Negligent performance of a military duty	Withdrawn						
			129	An act to the prejudice of good order and discipline	Guilty						
			129	An act to the prejudice of good order and discipline	Guilty						
12	SCM	Crawford, AB	130 (129 CCC)	Resisting a peace officer	Guilty	Reprimand and $300 fine	N/A	Edmonton	Edmonton	CLS	English
			97	Drunkenness	Guilty						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
13	SCM	Dandrade, LS	83	Disobeying a lawful command	Withdrawn	10 days detention	N/A	Gatineau, QC	Asticou, QC	ADM(IM)	English
			90	Absent without leave	Guilty						
			90	Absent without leave	Guilty						
			83	Disobeying a lawful command	Guilty						
			83	Disobeying a lawful command	Guilty						
			83	Disobeying a lawful command	Withdrawn						
			90	Absent without leave	Guilty						
14	SCM	Dashney, LS	129	Conduct to the prejudice of good order and discipline	Guilty	Reprimand and $1000 fine	N/A	Esquimalt	Esquimalt	CMS	English
			129	Conduct to the prejudice of good order and discipline	Withdrawn						
15	SCM	Dery, Lt	129	Conduct to the prejudice of good order and discipline	Guilty	$750 fine	N/A	Montreal	Cap-chat instruction camp	CLS	French
			93	Cruel or disgraceful conduct	Withdrawn						
16	DCM	Dilello, Sgt	130 (264.ICCC)	Uttering threats	Not Guilty	N/A	N/A	North Bay	CFB North Bay	CAS	English
			130 (264.ICCC)	Uttering threats	Not Guilty						
			95	Abuse of subordinates	Not Guilty						
17	SCM	Dubé, Cpl	130 (82(I) CCC)	Possession without lawful excuse of an explosive	Guilty	Reprimand and $500 fine	N/A	Valcartier	St. Francis QC	CLS	French

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
18	SCM	Edwards, Lt(N)	130 (153(1)(b) CCC)	Sexual exploitation	Not Guilty	Dissmissal from the CF	N/A	Hamilton, ON	Amsterdam, Netherlands	CMP	English
			130 (153(1)(b) CCC)	Sexual exploitation	Not Guilty						
			130 (153(1)(b) CCC)	Sexual exploitation	Not Guilty						
			130 (153(1)(b) CCC)	Sexual exploitation	Not Guilty						
			92	Scandalous conduct	Not Guilty						
			93	Cruel or disgraceful conduct	Guilty						
19	SCM	Ellis, OS	130(5(1) CDSA)	Trafficking of Substances	Guilty	9 months imprisonment	N/A	Esquimalt	Esquimalt	CMS	English
			130(5(1) CDSA)	Trafficking of Substances	Guilty						
			129	Conduct to the prejudice of good order and discipline	Guilty						
			129	Conduct to the prejudice of good order and discipline	Guilty						
20	SCM	Floyd, MCpl	90	Absent without leave	Guilty	Reduction in rank to Pte	N/A	Valcartier	Quebec City	CLS	English
21	GCM	Fraser, MCpl	130(236(a)CCC)	Manslaughter	Withdrawn	N/A	N/A	CFB Shilo	Kandahar, Afghanistan	CLS	English
			124	Negligent performance of a military duty	Withdrawn						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
22	SCM	Gaffey, Cpl	130 (264.1CCC)	Uttering threats	Stay	Reprimand and $1000 fine	N/A	ASU London	London ON	CLS	English
			118	Uses insulting language before a service tribunal	Guilty						
23	DCM	Gardiner, Sgt	129	Neglect to the prejudice of good order and discipline	Not Guilty	N/A	N/A	Hamilton, ON	Kandahar, Afghanistan	CEFCOM	English
			129	Neglect to the prejudice of good order and discipline	Withdrawn						
24	SCM	Gendron, Pte	130 (271 CCC)	Sexual assault	Guilty	7 days imprisonment	N/A	Valcartier	CFB Kingston	CLS	French
25	DCM	Gero, Ex-POI	114	Stealing	Withdrawn	Reprimand and $1500 fine	N/A	Halifax, NS	Halifax, NS	CMS	English
			116	Destruction, damage, loss or improper disposal	Guilty						
26	SCM	Henderin, OCdt and Rivard, Ex-OCdt	130 (367 CCC)	Forgery	Withdrawn	$200 fine (Rivard) Caution (Henderin)	N/A	Kingston, ON	Kingston, ON	CMP	English
			125 (c)	With intent to deceive alters a document required for an official purpose	Withdrawn						
			129	An act to the prejudice of good order and discipline	Guilty						
27	SCM	Hentges, Cpl	125(c)	With intent to deceive alters a document required for an official purpose	Not Guilty	N/A	N/A	Gatineau, QC	Ottawa, ON	VCDS	English

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
28	SCM	Hernandez, Lt	130 (266 CCC)	Assault	Guilty	Reprimand and $1000 fine	N/A	CFB Wainwright	CFB Borden	CLS	English
			97	Drunkenness	Guilty						
29	SCM	Houston, LS	114	Stealing	Guilty	Reprimand and $1000 fine	N/A	St. John's	CFS St. John's	CMS	English
30	SCM	Jenkins, Pte	130 (271 CCC)	Sexual assault	Not Guilty	N/A	N/A	St. Jean Garrnison	Montreal, QC	CMP	English
31	SCM	Joseph, MCpl	125(a)	Wilfully (or negligently) made a false entry	Guilty	Reprimand and $1200 fine	N/A	North Bay, ON	North Bay, ON	CLS	English
32	SCM	Kettle, Bdr	130 (4(1) CDSA)	Possession of a subantace	Guilty	Severe reprimand and $1000 fine	N/A	CFB Gagetown	Oromocto, NB	CLS	English
33	SCM	Labrie, Cpl	130 (80 CCC)	Dangerous handling of explosive substance	Stay	Reprimand and $1000 fine	N/A	Garnison Valcartier	New Mexico, USA	CLS	French
			127	Injurious or destructive handling of a dangerous substance	Guilty						
34	SCM	Labrie, OS	90	Absent without leave	Guilty	30 days imprisonment (suspended), dismissal from CF, and $1000 fine	N/A	CFB Esquimalt	Esquimalt	CMS	French
			129	An act to the prejudice of good order and discipline	Guilty						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
35	GCM	Lee, OS	130 (5(I) CDSA)	Trafficking of substances	Guilty	5 months imprisonment	N/A	CFB Esquimalt	CFB Esquimalt	CMS	English
36	SCM	Leslie, Capt	124	Negligent performance of a military duty	Not Guilty	Severe reprimand and $4000 fine	N/A	Petawawa	Kandahar, Afghanistan	CLS	English
			124	Negligent performance of a military duty	Guilty						
37	SCM	Lewis, Cpl	125 (a)	Wilfully (or negligently) made a false entry	Guilty	Severe reprimand and $ 2500 fine	N/A	CFB Trenton	CFB Trenton	CAS	English
			117 (f)	An act of fraudulent nature	Guilty						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
38	SCM	Lueke, Ex-LS	129	Conduct to the prejudice of good order and discipline	Not Guilty	Severe reprimand and $2000 fine	N/A	Esquimalt	Esquimalt	CMS	English
			129	Conduct to the prejudice of good order and discipline	Not Guilty						
			90	Absent without leave	Not Guilty						
			90	Absent without leave	Guilty						
			75(h)	When acting as sentry or lookout, leaves his post before he is regularly relieve, or sleeps, or is drunk	Stayed						
			124	Negligent performance of a military duty	Guilty						
			90	Absent without leave	Guilty						
			125(c)	With intent to deceive alters a document required for an official purpose	Not Guilty						
			90	Absent without leave	Guilty						
			90	Absent without leave	Guilty						
			129	Neglect to the prejudice of good order and discipline	Guilty						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
39	DCM	Liwyj, Cpl	83	Disobeyed a lawful command of a superior officer	Stay	N/A	N/A	Shilo, MB	CFB Shilo, MB	CLS	English
			83	Disobeyed a lawful command of a superior officer	Stay						
			83	Disobeyed a lawful command of a superior officer	Stay						
40	SCM	Marchand, Cpl	130 (266 CCC)	Assault	Guilty	Severe reprimand and $5400 fine	N/A	CFB Cold Lake	Cold Lake	CAS	English
			130 (266 CCC)	Assault	Guilty						
			130 (266 CCC)	Assault	Guilty						
41	SCM	Matusheskie, MCpl	83	Disobeying a lawful command	Guilty	Reprimand and $750 fine	N/A	Petawawa	Petawawa	CLS	English
42	SCM	McCallum, Cpl	130 (271 CCC)	Sexual assault	Not Guilty	N/A	N/A	London	Meadford, ON	CLS	English
43	SCM	McLean, Sgt	117 (f)	An act of fraudulent nature	Not Guilty	Reprimand and $1500 fine	N/A	Gagetown	Petawawa	CLS	English
			117 (f)	An act of fraudulent nature	Guilty						
44	GCM	Middlemiss, MS	83	Disobeyed a lawful command of a superior officer	Guilty	Reprimand and $500 fine	N/A	Colorado Springs	Colorado Springs	VCDS	English
			83	Disobeyed a lawful command of a superior officer	Guilty						
			90	Absent without leave	Guilty						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
45	SCM	Miksovsky, Ex-Cpl	90	Absent without leave	Guilty	Reprimand and $250 fine	N/A	Petawawa	CFB Petawawa	CLS	English
			129	An act to the prejudice of good order and discipline	Withdrawn						
46	SCM	Mills, MCpl	130 (267 CCC)	Assault with a weapon	Guilty	30 days detention suspended	DNA order and 2 yr. weapon	Cold Lake, AB	Kandahar, Afghanistan	CLS	English
			86	Quarrels and disturbances	Withdrawn						
47	SCM	Morin, Sgt	97	Drunkenness	Not Guilty	N/A	N/A	Wainwright	Calgary, AB	CLS	French
48	SCM	Noah, Pte	130 (4(1) CDSA)	Possession of substances	Guilty	Severe reprimand and $1000 fine	N/A	Winnipeg	Oromocto, NB	CAS	English
49	SCM	Osmond, Ex-Cpl	90	Absent without leave	Guilty	Severe Reprimand and $750 fine	N/A	CFS St. John's	CFB Toronto	CMS	English
			129	Conduct to the prejudice of good order and discipline	Withdrawn						
			129	Conduct to the prejudice of good order and discipline	Withdrawn						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
50	SCM	Pearson, MCpl	130 (5(1) CDSA)	Trafficking of substances	Guilty	60 days imrprisonment (suspended)	N/A	Gatineau, QC	Ottawa, ON	ADM(IM)	English
			130 (5(1) CDSA)	Trafficking of substances	Guilty						
			130 (5(2) CDSA)	Possession for the purpose of trafficking	Withdrawn						
			130 (4(1) CDSA)	Possession of substances	Guilty						
			130 (4(1) CDSA)	Possession of substances	Withdrawn						
51	SCM	Pelletier, MWO	114	Stealing	Withdrawn	Severe Reprimand $3000 fine	N/A	CFB Wainwright	CFB Wainwright	CLS	French
			129	An act to the prejudice of good order and discipline	Guilty						
			112	Used a vehicle of the CF for an unauthorized purpose	Guilty						
			112	Used a vehicle of the CF for an unauthorized purpose	Guilty						
52	GCM	Reid, PO2 and Sinclair, PO2	124	Negligent performance of a military duty	Withdrawn	Reduction in rank to LS, $300 fine and severe reprimand for Sinclair only	N/A	CFB Esquimalt	Ottawa, ON	CMS	English
			130 (430(5) CCCC)	Mischief to data	Withdrawn						
			116	Wilfully damaged property of her Majesty's Forces	Guilty damaging a database icon						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
53	SCM	Robertson, Cpl	125 (a)	Wilfully (or negligently) made a false entry	Withdrawn	$600 fine	N/A	Winnipeg	Winnipeg	CAS	English
			125 (a)	Wilfully (or negligently) made a false entry	Guilty						
54	SCM	Rompré, Maj	127	Injurious or destructive handling of a dangerous substance	Not Guilty	N/A	N/A	Montreal	Farnham	CLS	French
55	SCM	Rose, Cpl	114	Stealing	Guilty	Reduction in Rank and $750 fine	N/A	Edmonton, AB	Edmonton, AB	CLS	English
56	DCM	Russell, MCpl	130 (86(1)CCC)	Careless use of a firearm	Not Guilty	N/A	N/A	Comox, BC	Kandahar, Afghanistan	CEFCOM	English
			83	Disobeying a lawful command	Not Guilty						
			129	Conduct to the prejudice of good order and discipline	Not Guilty						
57	SCM	Savaria, Capt	130 (367 CCC)	Forgery	Guilty	Severe reprimand and $3000 fine	N/A	CFB Valcartier	Between Quebec City and Winnipeg	CMP	French
			125(c)	Suppressed or altered a military document with intent to deceive	Not Guilty						
			130 (368 CCC)	Used forged documents	Not Guilty						
			122	False answer or information	Not Guilty						
			122	False answer or information	Not Guilty						

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
58	SCM	Springer, Cpl	130 (4(1) CDSA)	Possession of substances	Guilty	Severe reprimand and $1000 fine	N/A	Gagetown, NB	Oromocto, NB	CLS	English
59	DCM	St-Onge, Ex-Pte	130 (5(1) CDSA)	Trafficking of substances	Withdrawn	30 days imprisonment	N/A	Valcartier	Quebec	CLS	French
			130 (4(1) CDSA)	Possession of substances	Guilty						
			129	An Act to the prejudice of good order and discipline	Guilty						
			129	An act to the prejudice of good order and discipline	Guilty						
			115	Receiving	Suspended						
			129	An act to the prejudice of good order and discipline	Guilty						
			85	Insubordinate behaviour	Guilty						
60	DCM	Strong, Cpl	130 (86(1) CCC)	Careless use of a firearm	Terminated	N/A	N/A	CFB Trenton	Kandahar, Afghanistan	CAS	English
			83	Disobeying a lawful command	Terminated						
			129	An act to the prejudice of good order and discipline	Terminated						
61	SCM	Szczerbaniwicz LCol	130 (267(b) CCC)	Assault causing bodily harm	Guilty of Assault	$1800 fine	N/A	Toronto, ON	Brussels, Belgium	VCDS	English

#	Type	Rank	Offence	Description	Disposition	Sentence	Order at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
62	SCM	Tardif, Ex-Pte	130 (5(1) CDSA)	Trafficking of substances	Withdrawn	30 days imprisonment suspended	N/A	Valcartier	Courcelette, QC	CLS	French
			130 (5(2) CDSA)	Possession for the purpose of trafficking	Guilty						
63	DCM	Thompson, Sgt	129	Conduct to the prejudice of good order and discipline	Guilty	Reduction in rank	N/A	Petawawa	Wainwright, AB	CLS	English
			129	Neglect to the prejudice of good order and discipline	Not Guilty						
			129	Conduct to the prejudice of good order and discipline	Guilty						
64	SCM	Venator, Cpl	130 (5(1) CDSA)	Trafficking of substances	Terminated	N/A	N/A	CFB Gagetown	Oromocto	CLS	English
			130 (5(1) CDSA)	Trafficking of substances	Terminated						
			130 (5(1) CDSA)	Trafficking of substances	Terminated						
65	SCM	Whelan, MCpl	129	Conduct to the prejudice of good order and discipline	Guilty	Reprimand and $1000 fine	N/A	Petawawa	Kandahar, Afghanistan	CLS	English

ANNEX C | **ANNEX B**

Disposition By Court Martial

	2008-2009	
	#	%
Guilty of at least one charge	52	78%
Not guilty of any charges	9	13%
Stay of Proceedings	1	2%
Withdrawal of all charges	1	2%
Other (Terminated)	4	5%
Total	**67**	**100%**

Two joint trials therefore 4 decisions in 2 trials

Sentences

Punishment Type	2008-2009	
	#	%
Imprisonment	7	8%
Dismissal	3	3%
Detention	2	2%
Reduction in Rank	6	7%
Severe Reprimand	16	18%
Reprimand	15	17%
Fine	40	44%
Confined to Barracks	0	0%
Extra Work and Drill	0	0%
Caution	1	1%
Total	**90**	**100%**

Language of Trial

	2008-2009	
	#	%
Trial in English	51	78%
Trial in French	14	22%
Total	**65**	**100%**

Courts Martial By Command

	2008-2009	
	#	%
CLS	32	48%
CMS	11	16%
CAS	6	9%
CEFCOM	3	4%
CANSOFCOM	1	2%
VCDS	5	7%
CMP	6	9%
ADM(IM)	3	5%
Total	**67**	**100%**

Courts Martial By Rank

	2008-2009	
	#	%
Private and Corporal (Includes Master Corporal)	42	62%
Sergeant to Chief Warrant Officer	12	18%
Officer	13	20%
Total	**67**	**100%**

Type of Court Martial

	2008-2009	
	#	%
Standing Court Martial	50	76%
Disciplinary Court Martial	10	15%
Special General Court Martial	0	0
General Court Martial	5	9%
Total	**65**	**100%**

Summary Of Charges

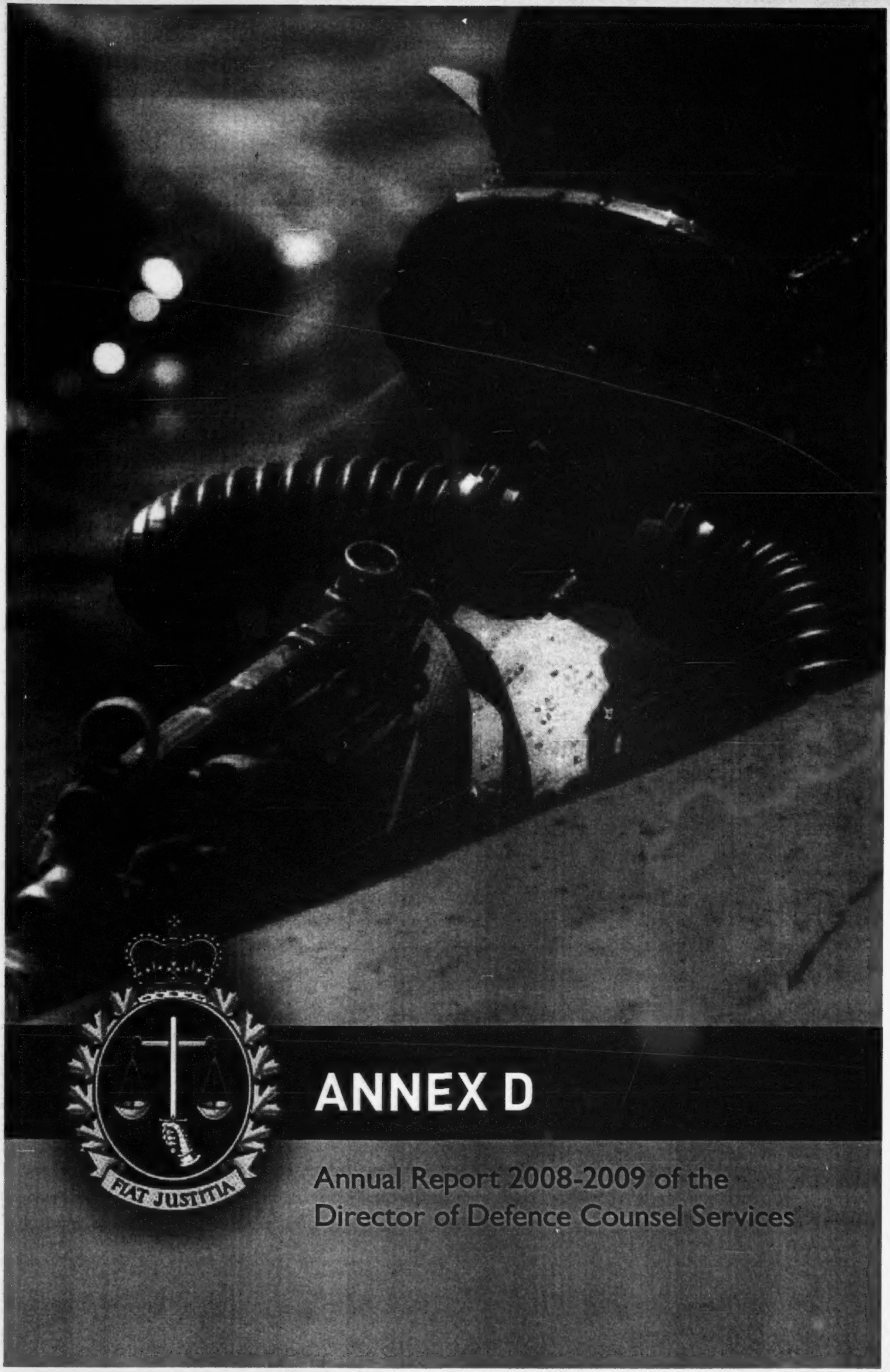
NDA Section	Description	2008-2009
75(h)	When acting as sentry or lookout, leaves his post before he is regularly relieved, or sleeps, or is drunk	1
83	Disobeying a lawful command	13
85	Insubordinate behaviour	1
86	Quarrels and disturbances	1
90	Absent without leave	13
92	Scandalous conduct	1
93	Cruel or disgraceful conduct	3
95	Abuse of subordinates	1
97	Drunkenness	3
112	Used a vehicle of the CF for unauthorized purpose	3
114	Stealing	4
115	Receiving	1
116	Destruction, damage, loss or improper disposal	3
117(f)	An act of a fraudulent nature	8
118	Uses insulting language before a service tribunal	1
122	False answer or information	2
124	Negligent performance of a military duty	12
125(a)	Willfully (or negligently) made a false entry	16
125(c)	With intent to deceive alters a document required for an official purpose	5
127	Injurious or destructive handling of a dangerous substance	3
129	An act to the prejudice of good order and discipline	12
129	Conduct to the prejudice of good order and discipline	16
129	Neglect to the prejudice of good order and discipline	7
130 (4(1) CDSA)	Possession of substances	7
130 (5(1) CDSA)	Trafficking of substances	11
130 (5(2) CDSA)	Possession for the purpose of trafficking	3
130 (80 CCC)	Dangerous handling of an explosive substance	1
130 (82(1) CCC)	Possession without lawful excuse of an explosive substance	1
130 (86(1) CCC)	Careless use of a firearm	2
130 (122 CCC)	Breach of public trust by public officer	3
130 (129 CCC)	Resisting a peace officer	1

130 (153(1)(b) CCC)	Sexual exploitation	4
130 (236(a) CCC)	Manslaughter	1
130 (264(1) CCC)	Uttering threats	3
130 (266 CCC)	Assault	5
130 (267 CCC)	Assault with a weapon	1
130 (267(b) CCC)	Assault causing bodily harm	2
130 (271 CCC)	Sexual assault	3
130 (367 CCC)	Forgery	3
130 (368 CCC)	Uttering a forged document	3
130 (380 CCC)	Fraud	1
130 (430(5) CCC)	Mischief in relation to data	2
Total offences		**187**

ANNEX C | **ANNEX C**

CMAC #	Appellant	Respondent	Type of Appeal	Result
495	Capt Nociar	Her Majesty the Queen	Legality of finding/ severity of sentence	Appeal granted
498	OCdt Trépanier	Her Majesty the Queen	Constitutional issue	Appeal granted
503	MCpl Billard	Her Majesty the Queen	Severity of sentence	Appeal dismissed
502	Her Majesty the Queen	Sgt Couture	Legality of finding	Appeal granted
504	Ex-Cpl Beek	Her Majesty the Queen	Legality of finding/severity of sentence	Appeal granted
506	Pte Khadr	Her Majesty the Queen	Legality of finding/ Severity of sentence	Dismissed before audition
507	Cpl Hentges	Her Majesty the Queen	Legality of finding/ Severity of sentence	Dismissed before audition
508	Pte Tupper	Her Majesty the Queen	Severity of sentence	Waiting for decision
509	MS Willms	Her Majesty the Queen	Legality of finding	Appeal granted
510	PO1 McDougall	Her Majesty the Queen	Legality of finding/ Severity of sentence	Appeal granted
511	OCdt Warren	Her Majesty the Queen	Legality of sentence/ Severity of sentence	Dismissed before audition
512	MCpl Matusheskie	Her Majesty the Queen	Legality of finding	Waiting for decision
513	LCol Szczerbaniwicz	Her Majesty the Queen	Legality of finding	Waiting for decision
514	Ex-Cpl Stevens	Her Majesty the Queen	Legality of finding	Dismissed before audition
515	Sgt Thompson	Her Majesty the Queen	Legality of finding/ Severity of sentence	Ongoing
516	Her Majesty the Queen	Cpl Liwyj	Legality of finding	Appeal granted
517	Pte St-Onge	Her Majesty the Queen	Legality of finding/ Severity of sentence	Ongoing
518	Her Majesty the Queen	Cpl Venator	Legality of finding	Abandoned
519	Her Majesty the Queen	Pte Jenkins	Legality of finding	Abandoned

CMAC #	Appellant	Respondent	Type of Appeal	Result
520	Cpl Mills	Her Majesty the Queen	Legality of finding/ Severity of sentence	Ongoing
521	LS Dandrade	Her Majesty the Queen	Legality and severity of sentence	Abandoned
523	OS Lee	Her Majesty the Queen	Legality of finding/ Severity of sentence	Ongoing
524	PO2 Reid	Her Majesty the Queen	Severity of sentence	Ongoing
525	Capt Savaria	Her Majesty the Queen	Legality of finding	Ongoing
526	PO2 Sinclair	Her Majesty the Queen	Severity of sentence	Ongoing
527	PO1 Bradt	Her Majesty the Queen	Legality of finding	Ongoing



FIAT JUSTITIA

ANNEX D

Annual Report 2008-2009 of the Director of Defence Counsel Services

Prepared by Lieutenant-Colonel Jean-Marie Dugas

Introduction

1. This is the 10th annual report of the Director of Defence Counsel Services (DDCS) presented to the Judge Advocate General (JAG), Brigadier General K. W. Watkin. By virtue of the National Defence Act, I perform my duties under his general direction. As for the past years, the JAG maintained his interest in the military justice system, in particular with regard to delay. Amongst the initiatives taken during the last fiscal year in that regard, we should note the external review requested by the JAG on the functionality of the DCS whose final report will be completed in the next fiscal year.

2. The format of this document conforms to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 101.20. This report, my sixth as Director, covers the period from 1 April 2008 to 31 March 2009 and contains:

   - An overview of the DCS and changes throughout the year;
   - A review of the DCS's duties and responsibilities;
   - A review of the relationships between the Director, the staff and counsel of DCS, the Judge Advocate General (JAG) and the chain of command;
   - An overview of the services provided during the reporting period; and
   - DCS general activities.

3. During the last year, the DCS workload was significant. It was amplified by a high turnover rate. First, two lawyers who had completed only one year with DCS left, while a fulltime lawyer was deployed without being replaced. In that sense, it was a challenge to meet the judicial calendar demands, especially when the number of regular lawyers was, at certain time, lower than the number of judges. And while the postings summer period should have given us time to pause, it was transformed to a judicial marathon for the preparation of two factums on behalf of the respondent for the Supreme Court of Canada (SCC). In order to meet the demand, the budget for both the reserve and civilian lawyers was raised this year.

4. With a judicial break of almost two months, the DCS team must concentrate its work in courts martial within ten months. On another matter, the modifications to the rules applicable to the appeal committee had the consequence that no files submitted by accused were processed for the moment. We are waiting for the committee to reunite to decide on the merits.

5. In comparison with last year figures, the activities for year 2008-09 were as follows:

    a. 169 active court martial files (increase of 39);

    b. 65 courts martial completed, including 14 in French

    c. 232 days in court (increase of 92);

    d. 1500 (approx.) instances of advice given to service members and other persons subject to the *Code of Service Discipline*(CSD);

    e. 4 cases before the Court Martial Appeal Court (CMAC) (decrease of 6);

    f. 1 lawyer deployed (increase of 1).

6. In order to improve the effectiveness of the decision-making process, the delegated contractual authority of DCS has been increased. Nevertheless, legal fees associated with one case on appeal led by a civilian lawyer still await payment after almost one year. This shows that it is difficult to manage special files which involve legal fees higher than the maximum delegated to DDCS.

7. The decision in the CMAC in the *Trépanier*[1] case resulted in changes to the provisions of the NDA. Despite the substantial modifications to the Act and although prosecution's leave to the SCC was dimissed, other constitutional issues remain. Some were submitted to the court martial and the CMAC. The delays associated in receiving those decisions by the ad hoc tribunal required both a professional and personal investment of all members of the team.

8. According to the defence, the selection of members of the General Court Martial panel, the discrimination of the ranks of the panel members and the system of sentencing are among these issues where improvement of the military justice system should be sought.

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[1] *R. v. Trépanier*, [2008] CMAC 3, CMAC-498, leave to appeal to S.C.C. dismissed 25 Sept 2008.

For example, we submit that the limited range of sentences available at the Court Martial precludes an accused under the CSD of legitimate options available for similar infractions under the *Criminal Code.*

9. On the judicial administration side, we would like that the process related to the convening of court martial and the process of fixing dates be better suited to the reality of the system. Despite the efforts and good will showed by the different contributors, a transparent management of each step is required as well as a longer timeline to respond. For example, an accused directly receives the information relative to his obligation to make a choice on the type of court martial without going necessarily through their defence counsel. Experience shows that the military personnel so informed seem distraught upon receiving their charge sheet and related documents. Unsure as to what to do next, they do not choose, thus deemed 14 days later to have selected a General Court Martial (GCM) pursuant to NDA. In our opinion, absence of a choice initiates too soon the process of convening a GCM and the work associated with it for the CMA.

10. At DCS, the number of cases dealt with greatly exceeds the number of courts martial. Although certain cases are withdrawn by the prosecution, they nevertheless required an important human resources and financial investment for several months. In some cases, the withdrawal only occurred at the trial, often several months after the charge was laid. Although a tangible improvement has been noted in this regard, further improvement would allow more energy to be focussed on the cases that require more immediate attention.

11. The willingness of all interveners to address questions pertaining to delay has led to improvements. It appears from our data that the files involving long delays are no longer predominant which results in our activities being more efficient and effective. Besides, at the time of this report, eight (8) cases were still awaiting a trial date. In order to identify potential avenues of improvement, the JAG has required an external review of the DCS pertaining to its role with regard to delay.

DCS Organization

12. The bilingual requirement of the duty counsel line complicates the recruitment of experienced military lawyers. On the other hand, the recruitment of civilian personnel was a success this year, because of the support of the human resources services and the reclassification of certain positions.

13. For the reserve force, two positions in Western Canada and one in Eastern Canada remain to be filled. Some candidates are interested but the process of hiring is long. There is also a need for certain positions to be geographically repositioned. Two other positions vacant in Ontario and Quebec are in the process of being filled by candidates who have accepted their offers but are still awaiting their nominations.

14. The JAG organization is sensitive to the informatics needs of the reserve lawyers who still have very limited access to the DND network and information pertaining to military justice. The duplication of computers, one for their military cases and another for their private practice, is bothersome to the reserve lawyers. We are working on ways to ease their access. Requests have been made for provisions of equipment compatible with the new protected network.

Duties and Responsibilities

15. Our duties and responsibilities under the NDA have been slightly modified with regards to legal advice pertaining to board of inquiry matters. The new regulation must be interpreted as authorizing DCS to only provide consultation services to individuals and no more representation services when they receive a notice of adverse evidence. From a DCS perspective, this limitation might be seen as being negative all the more since such board of inquiries could rely on a recently enhanced legal support.

16. The principal activities provided by DCS are specified by QR&Os and are summarized as follows:

Legal Counsel Services:

- To detained persons:
    - To persons held in custody, at hearings by a military judge under ss. 159(1) of the NDA to determine retention in custody [QR&O 101.20 (2) (e)].
- To accused persons:
    - At courts martial [QR&O 101.20 (2) (f)];
    - Where there are reasonable grounds to believe that the accused person is unfit to stand trial, at hearings to determine fitness to stand trial [QR&O 101.20 (2) (b)]; and

  - In cases where a finding of unfit to stand trial has been made, at hearings as to the sufficiency of admissible evidence to put the accused person on trial [QR&O 101.20 (3) (c)].
- To persons sentenced at courts martial to detention or imprisonment, at hearings for:
  - Release pending appeal [QR&O 101.20 (3) (b)];
  - Review of undertakings for release pending appeal [QR&O 101.20 (3) (b) and 118.23]; and
  - Cancellation of release pending appeal [QR&O 118.23].
- To the respondent (offender), at CMAC or SCC hearings where prosecution authorities appeal the legality of a finding or the severity of a sentence awarded by court martial [QR&O 101.20 (2) (g)].
- To a person on an appeal or an application for leave to appeal to the CMAC or the SCC, with the approval of the Appeal Committee [QR&O 101.20 (2) (h)].

Advisory Services:

- To persons arrested or detained in respect of a service offence pursuant to s. 10(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), on a 24/7 basis [QR&O 101.20 (2) (a)].
- To assisting officers and accused persons with respect to the making of an election to be tried by court martial pursuant to QR&O 108.17 and 108.18 [QR&O 101.20 (2) (d)].
- To assisting officers or accused persons on matters of a general nature relating to summary trials [QR&O 101.20 (2) (c)].
- To persons subject to an investigation under the CSD, a summary investigation or a board of inquiry [QR&O 101.20 (2) (i)].

Relationship between DCS, DCS Personnel, the Judge Advocate General and the Chain of Command

17. Regular meetings between the JAG and DCS continued and have promoted positive developments for both our organization in particular and the military justice system as a whole.

18. The JAG has not issued guidelines of general application to DCS military lawyers during this reporting period although his authority of general supervision over DDCS pursuant to ss. 249.2(2) of the NDA, allows him to do so.

Professional Development

19. With regard to continuing education, the National Criminal Law Program remains the main source of training in criminal law for DCS. Every year, all regular force lawyers and one reserve lawyer participate in that five (5) day program. In addition, there is the annual DCS training, where for two (2) days defence counsel receive and give lectures on new developments in criminal law, decisions of the CMAC and on modifications to the NDA. And lastly, the mandatory continuing education requirements of some provincial bar associations is monitored within the global training framework of the JAG.

The Budget

20. The budget allocated to courts martial is more adapted to meet the objective of reducing the delays to hold a court martial. However, financial planning remains difficult especially with files that are carried over from one fiscal year to the next.

21. The financial authority of DDCS for external professional services is limited to $50,000. During this reporting period no cases in court martial have required authorization above this amount. However with appeal cases this amount is sometimes insufficient. In cases where the accused has retained a civilian lawyer of his/her choice, the maximum amount allocated sometimes limits the choice of counsel.

22. With the increase in the tempo of courts martial, it is often more difficult to obtain the transcriptions of stenographic notes for use in other cases in a timely fashion. However, the use of such notes is from our perspective an economical way of bringing evidence before the court with all participants consent and when the circumstances are appropriate. During the last reporting period, DCS encountered supplementary transcription fees for certain preliminary decisions of the court and for witness statements given both during investigation and in-court testimony.

Services Provided

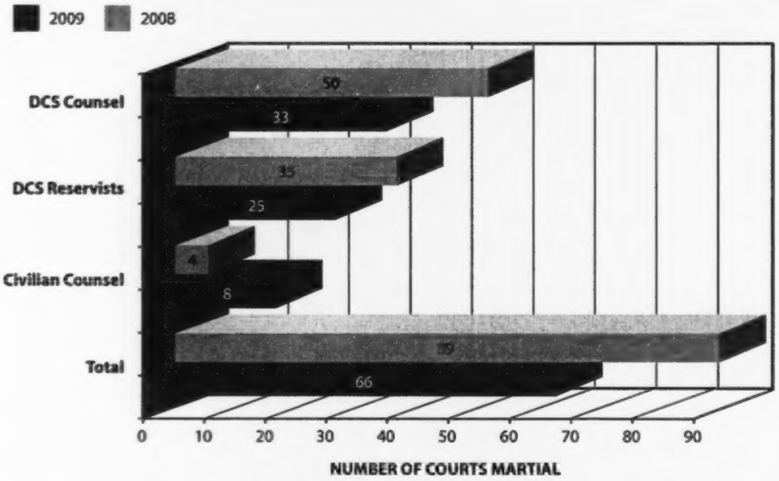
Counsel Services

COURTS MARTIAL

23. When facing a court martial, an accused person under the CSD has the right to be represented by DCS counsel at public expense, may retain legal counsel at his or her own expense, or may choose not to be represented.

24. During the reporting period, 66 courts martial involving DCS commenced before the court martial. Of the 66 cases included in the following chart, (8) eight cases were conducted by civilian counsel retained by DCS. The sources of representation at courts martial are divided as follows:

REPRESENTATION AT COURTS MARTIAL



25. Pursuant to the authority granted under ss. 249.21(2) of the *NDA*, the DDCS may retain, at public expense, civilian counsel in cases where, for example, having received a request for representation by DCS counsel, no member of the DCS office can represent the particular individual because of a conflict of interest. Reliance on civilian counsel poses two major difficulties: first, few of them have suitable expertise in military law; second, where an inexperienced civilian counsel shows some interest, the DDCS must indirectly assume the costs of their professional development in military law, not to mention the time spent providing him/her with the minimal reference documents. The Office of the

JAG, in collaboration with DCS, is in the process of addressing this situation.

26. As demonstrated in the chart above, the involvement of reserve defence counsel is still very much sought after, as a direct result of the change in personnel and of the need for experience in disciplinary matters. Especially since this year there is still a large volume of records to process. DCS reserve counsel constitute an essential resource to the DCS.

COURT MARTIAL APPEAL COURT OF CANADA (CMAC)

27. Twenty two (22) appeals involving DCS counsel came before the CMAC during the period 2008-2009. Of those, nine (9) were filed during the previous fiscal year, the others having been filed during the current reporting period.

28. Appellants submitted requests for legal representation by DCS before the CMAC to the Appeal Committee in accordance with article 101.20(2)(h) of QR&O. These files, except for one, required the approval of the Committee. Four (4) requests were rejected for "lack of professional merit" and one case is still awaiting a decision of the court. From those requests, three appellants were not able to financially sustain their appeals which were then denied for failure to file the factum on time. Another was still pending awaiting the decision from the court.

29. DCS counsels were involved to different degrees in the following appeals during the reporting period. Several of these cases concern the constitutional claims raised by the defence in court martial:

- **OCdt Trépanier, J.S.K.** (CMAC 498)– The CMAC allowed *Trépanier*'s appeal in part and declare that section 165.14, subsection 165.19(1) of the NDA and article 111.02(1) of the QR&Os found to be no force and effect because they violate section 7 and 11(*d*) of the *Charter*. The inability to choose trier of fact through a mode of trial interfered with accused's constitutional right to a fair hearing in particular his right to make full answer and defence and to control the conduct of such defence. The application for leave to appeal by the prosecution to the SCC was dismissed.

- **Ex-Cpl Beek, D.D.** (CMAC-504) – The CMAC allowed the appeal of the Ex-Cpl Beek and ordered a new trial. The court followed the recommendation made by the CMAC in the *Trépanier* case where the appellant was an intervener. The CMAC believed that this was consistent with the interests of justice, the accused and the prosecution as well as respecting the *Charter* by giving the accused a right to choose his trier of facts.

- **Master Corporal McRea, J.** (CMAC-499)- As in the *Trépanier* case, the appeal challenges the question of the accused's choice of mode of trial. He also appealed the legality of the verdict on the grounds of misapplication of the doctrine of reasonable doubt with respect to the evidence from the accused, and the interpretation of the required *mens rea*. MCpl McRae abandoned his appeal on 17 March, 2008.
- **Master Corporal Billard, P.P.** (CMAC-503) - MCpl Billard appealed the severity of his sentence of 21 days of detention imposed by a military judge on 6 July 2007 for a charge of neglect to the prejudice of good order and discipline for which he pleaded guilty. The CMAC dismissed the appeal on the ground that the appellant's offence did not relate to the performance of his day-to-day tasks but as a member of a fighting unit which was then under attack. The CMAC noted that the misconduct of the appellant could endanger not only his safety but also that of his comrades.
- **Corporal Khadr, T.M.** (CMAC-506) – Cpl Khadr had a plea in bar of trial, for a stay of proceedings alleging infringement of his rights guaranteed by sections 7 and 11(d) of the *Charter*. At court martial, the military judge concluded that a reasonable observer would not have a perception of bias in the judicial process where the charge layer is also a witness in the case. The Appeal Committee did not approve the provision of legal counsel by DCS. Upon a motion by the Crown, the appeal was dismissed by the CMAC due to the failure to file the factum on time.
- **Corporal Hentges, J.L.** (CMAC-507) – The court martial found Cpl Hentges guilty of 17 charges under NDA; that is to say, 10 counts of willfully making a false entry in a document required for official purposes, and 7 counts of committing an act of a fraudulent nature. The appellant appealed the findings and the severity of the sentence. The Appeal Committee did not authorize a DCS lawyer to represent Corporal Hentges. Upon a motion by the Crown, the appealed was dismissed by the CMAC due to the appellant's failure to file the factum on time.

- **Sergeant Couture, N.** (CMAC-502) – The CMAC allowed the appeal of the prosecution and ordered a new trial. The CMAC decided that a deviation from the procedure in article 107.03 of the *QR&O* which requires legal advice before laying charges does not "necessarily" invalidate proceedings unless an injustice has been done to the accused by the deviation (101.06 *QR&O*). For the Court, the interpretation of the world "shall" and "must" is based on the common law rather than *QR&O* article 1.06.

- **Private Tupper, R.J.** (CMAC-508) – Private Tupper was found guilty by the court on 28 October 2007 of breaking out of barracks, of being absent without leave on two occasions, of insubordination for behaving with contempt toward a superior officer, of disobedience of a lawful command, and of resisting an escort whose duty was to apprehend him. Private R. J. Tupper appealed both the findings and the sentence. The hearing was held on 20 March 2009.

- **Master Seaman Willms, B.B.J.** (CMAC – 509) – Appealed his conviction by the court martial for assault and ill-treatment of a subordinate. The CMAC allowed the appeal and concluded that the Crown had not met its burden of proof beyond any reasonable doubt on the issue of *mens rea* and entered an acquittal.

- **Master Corporal Matusheskie, C.A.** (CMAC – 512) – On 2 April 2008 at CFB Petawawa the appellant was found guilty on the charge of disobedience of a lawful command contrary to section 83 of the NDA. The appellant submitted that the military judge erred in law when finding that the second and contradictory order given to the applicant was unlawful and that he was not justified to obey it, even though the said order was not manifestly unlawful. The hearing was held on 27 March 2009.

- **Ex-Corporal. Stevens, B.M.** (CMAC – 514) – In that matter, DCS was acting as *amicus curiae*. The appeal period had expired. Ex-Corporal Stevens made a motion to be relieved of his failure to file notice of appeal on time. The motion by Ex-Cpl Stevens mentioned that he was not adequately represented by his civilian counsel at court martial and that as an incarcerated individual he was unable to act in a timely fashion. The CMAC did not grant the motion.

- **Sergeant Thompson, E.B.** (CMAC – 515) – On 12 June 2008, Sgt Thompson appealed his conviction and the severity of the sentence. He argued that the judge erred in dismissing the application for a stay of proceedings. He further maintained that the sentence imposed by the court was more than the minimum punishment required to maintain discipline in the CF. The hearing should be held during the next reporting period.

- **Ex-Private St-Onge, D.** (CMAC – 517) – A notice of appeal was filed by Ex-Private St-Onge, on 26 June 2008. At court martial the appellant pleaded guilty on five charges of possessing and consuming marihuana and on other disciplinary charges. The appellant raises as grounds for appeal that the court martial had no jurisdiction to try him and to impose a sentence of thirty days imprisonment which would be much exaggerated in the circumstances.

- **Corporal Liwyj, A.E.** (CMAC – 516) – In the wake of the *Trépanier* decision cited above, the military judge ordered a stay of proceedings, ruling he did not have jurisdiction over the accused, the court not being constituted according to his choice. However, the judge gave the option to re-prefer the charges to the CMA to convene a new court martial according to the choice of the accused. The prosecution appealed the decision. The appeal was allowed by the CMAC, both parties having consented to elect down to a standing court martial. A new trial was ordered, with a restriction on the maximum punishment should there be one.

- **Corporal Venator, W.J.** (CMAC – 518) – On 11 June 2008, the military judge ordered a conditional stay and terminated the proceedings based on the *Trépanier* decision. On 4 December 2008, the prosecution abandoned the appeal of the conditional stay. A new trial will take place.

- **Private Jenkins, D.A.** (CMAC – 519) – The prosecution filed a notice of appeal on 3 October 2008. It alleged that the military judge erred in law while applying the reasonable doubt tests enunciated by the SCC in *R v. W. (D).* The court martial had found the individual not guilty of sexual assault and of an act to the prejudice of good order and discipline. The appeal was abandoned.

- **Master Corporal Mills, T.J.** (CMAC – 520) – On 9 October, 2008 the service member appealed his conviction and the severity of the sentence The court martial found him guilty of two offences including one of provoking gesture toward a person subject to the CSD. In particular, the appeal alleges a violation of his right to be tried within a reasonable time. The appellant awaits the decision of the Appeal Committee.

- **Leading Seaman Dandrade, J.D.** (CMAC – 521) – Appeal from the decision of the court on the ground that the military judge erred in law by deciding there were no "compelling reasons" to suspend the ten (10) days of detention period. For the appellant, there is no such requirement under the *NDA*. The service member abandoned his appeal on 24 November 2008 prior to the hearing.
- **Ordinary Seaman Lee** (CMAC- 523) – A notice of appeal was filed on 23 January 2009. The member is appealing both his conviction on the charge of trafficking in illegal substances and on the severity of the sentence.

ADVISORY SERVICES

30. Bilingual service is available without cost, at any time and without interruption for all service members and other persons subject to the CSD serving abroad. DCS lawyers provide advice through three means of communication:

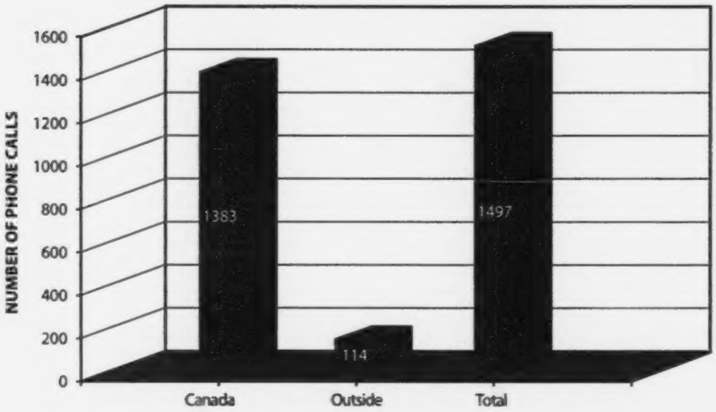
    a. Toll-free 1-800 number to ensure access to legal advice upon arrest or detention; this number is distributed throughout the CF, in particular to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature. The transfer to another telephone service provider has caused some difficulties in accessing the duty counsel service outside normal working hours. The problem was identified and has been resolved since.

    b. Standard direct telephone number, available to accused persons subject to the CSD, for advice in relation to an election between court martial and summary trial, or questions on other disciplinary matters, or all other matters authorized under the QR&O; and

    c. Email, an avenue now frequently used as first contact or to obtain information and whose popularity is growing.

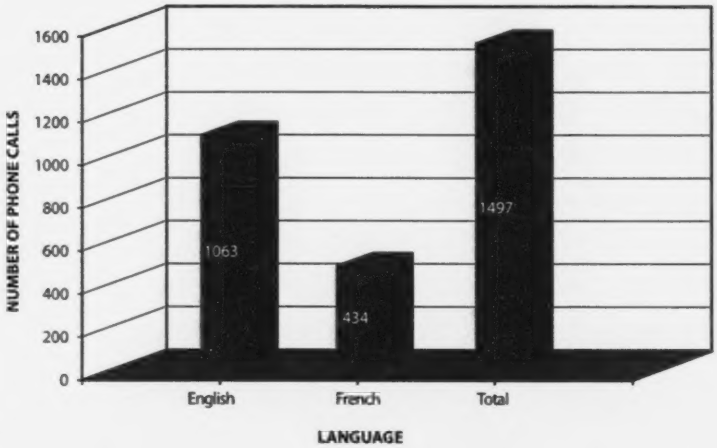
31. During the reporting period, DCS handled approximately 1500 calls. The calls ranged in duration but, on average, were approximately 15 minutes. This undertaking totalled more than 300 hours, similar to previous years. The origin of the calls is illustrated in the following graph:

PHONE CALLS BY ORIGIN



32. We have also tabulated the number of calls by the official language used by the caller, illustrated in the following graph:

PHONE CALLS BY LANGUAGE



33. As the collected data indicates, the advisory services of DCS remain the dominant aspect of our work. The high operational tempo to which service members are facing, has lead to numerous and complex requests for legal assistance, going far beyond the simple choice of the mode of trial by the accused. The participation of a large number

of reservists, which raises several legal issues, contributes to this complexity. The advisory service provided by DCS contributes to the protection of the fundamental rights of CF members and other individuals subject to the CSD.

34. While providing advice to individuals, we unfortunately found that many of them were ignorant of their rights or feared, wrongly or rightly, retaliation from the military hierarchy. To raise awareness, the DCS is studying the possibility of providing more information through its website which is under reconstruction. A better understanding of the role of DCS is even more relevant since that a rapid response from us often prevents certain disciplinary situations from escalating.

General Activities & Comments

35. At the request of the Senate Standing Committee on Legal Affairs and Constitutional, two DCS lawyers appeared before it. They summarily presented the defence's point of view and explained their position on what they consider as possible improvements of the NDA. The report of the Committee will be published in the next reporting period.

36. Among those avenues for improvement that we highlighted in the past, we should note the challenges posed by the payment of fines in cases where the decision of the court martial has been appealed. We believe that the procedure should be amended so that payment of these fines may be suspended pending appeal. Although the situation remains, our request has been discussed.

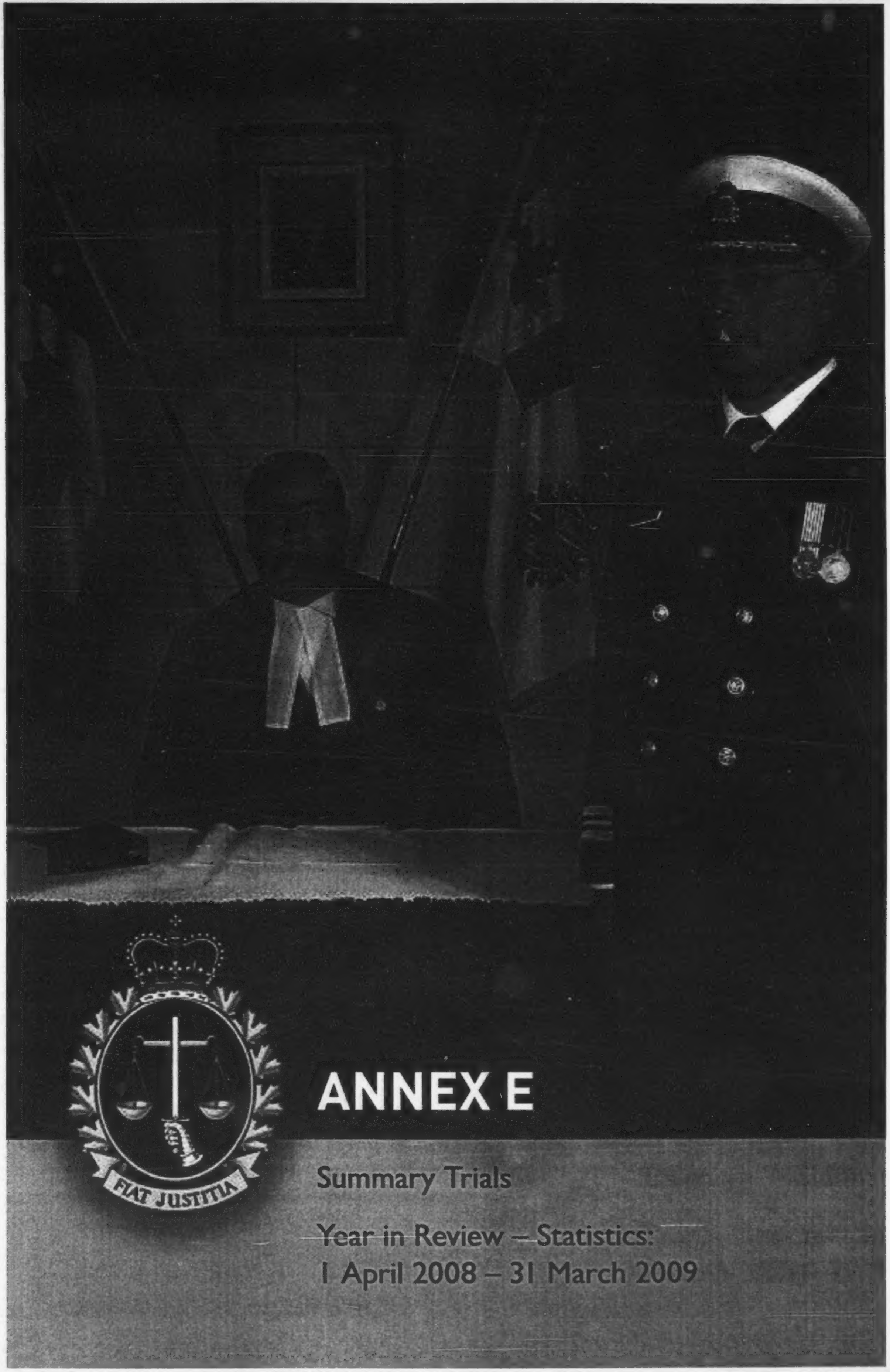
37. Our services were required a few times with regards to boards of inquiry and summary investigations. As previously mentioned, our role is now limited to consultation only under the current regulatory regime, which limits our intervention on these matters.

38. On another subject, the DCS was previously in charge of the administration of legal aid funds given to military personnel accused abroad. This role is now shared and in a large part assumed by the Directorate of Military Justice Policy and Research. The administration of this file was done in accordance with *Canadian Forces Administrative Order 111-2 – Employment of Civilian Defence Counsel in Foreign Criminal Court*, which was cancelled in February 2009 and should be replaced by a similar directive in the future.

Conclusion

39. The primary objective of DCS lawyers is to enable individuals to obtain justice with the minimum of delay. In that sense, both the human and financial resources provided during this year and the flexibility of the finance service have greatly facilitated our efforts, although a high turnover of our legal team has imposed an additional burden to them. Overall, we were able to deliver the goods since less than a dozen files were awaiting a court martial date at the end of the fiscal year.

40. Finally, following changes to the NDA by Bill C-60, modifications are required to some of the policies and directives related to the management of court martial files. A committee will begin this task in the next reporting period with the goal of contributing to better case management.



ANNEX E

Summary Trials

Year in Review – Statistics: 1 April 2008 – 31 March 2009

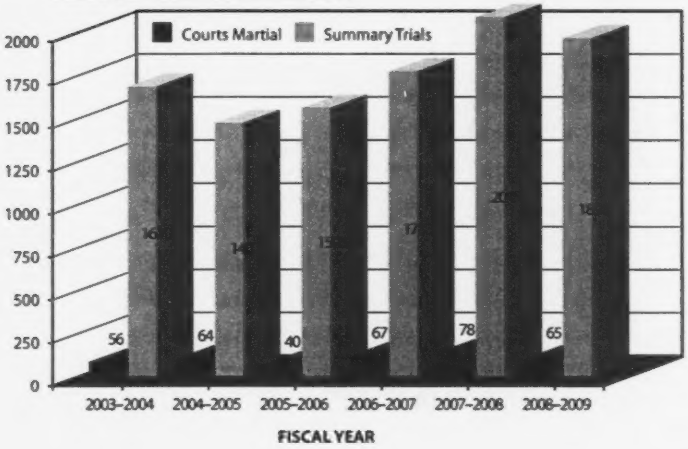
Summary Trials Reporting

Period 1 April 2008 – 31 March 2009

Distribution of Service Tribunals

	2007-2008		2008-2009	
	#	%	#	%
Number of courts martial	78	4	65	3
Number of summary trials	2045	96	1898	97
Total	**2123**	**100**	**1963**	**100**

DISTRIBUTION OF DISCIPLINARY PROCEEDINGS YEAR TO YEAR COMPARISON



Election to Court Martial

	2008-2009	
	#	%
Number of direct referrals to courts martial	72	3.60
Number elections to be tried by courts martial by the accused	28	1.40
Number of summary trials	1898	94.90
Not proceeded with	2	0.10
Total	**2000**	**100**
Number of elections offered to be tried by courts martial	536	
Percentage of persons electing courts martial		5.22

Language of Summary Trials

	2007-2008		2008-2009	
	#	%	#	%
Number in English	1551	76	1507	79
Number in French	494	24	391	21
Total	**2045**	**100**	**1898**	**100**

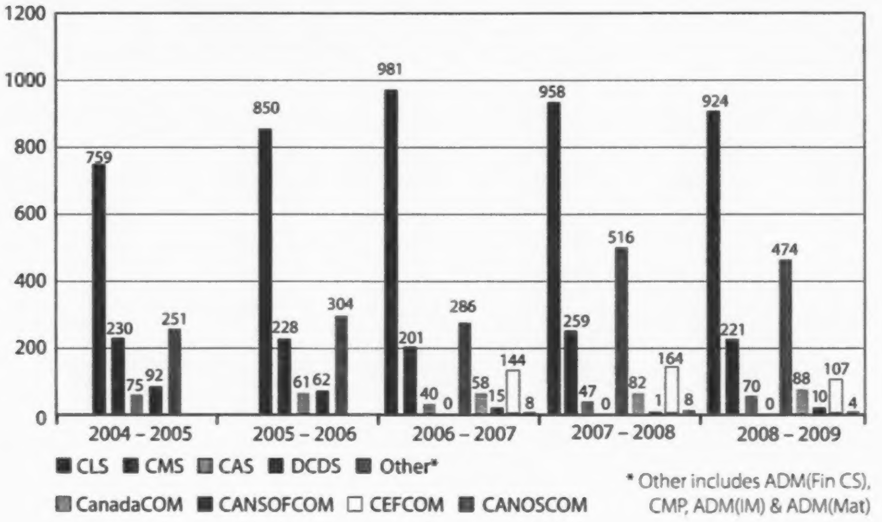
Note: *(1) The statistics in this annex are current as of the 9th of September 2009.*

(2) For statistics relating to prior years, refer to previous JAG Annual Reports.

Summary Trials by Command

	2007-2008		2008-2009	
	#	%	#	%
Vice Chief of the Defence Staff (VCDS)	5	0.24	3	0.16
Canada Command (CanadaCOM)	82	4.00	88	4.63
Canada Operational Support Command (CANOSCOM)	8	0.39	4	0.21
Canada Special Operations Forces Command (CANSOFCOM)	1	0.05	10	0.53
Canada Expeditionary Force Command (CEFCOM)	164	8.02	107	5.65
Chief of the Maritime Staff (CMS)	259	12.67	221	11.64
Chief of the Land Staff (CLS)	963	47.09	924	48.68
Chief of the Air Staff (CAS)	47	2.30	70	3.69
Chief Military Personnel (CMP)	492	24.06	463	24.39
Associate Deputy Minister (Information Management) (ADM (IM))	22	1.08	7	0.37
Associate Deputy Minister (Materiel) (ADM (Mat))	2	0.10	1	0.05
Total	**2045**	**100**	**1898**	**100**

COMMAND
YEAR TO YEAR COMPARISON



* Other includes ADM(Fin CS), CMP, ADM(IM) & ADM(Mat)

Summary Trials by Rank

	2007-2008		2008-2009	
	#	%	#	%
Private and Corporal (includes Master-Corporal*)	1776	87	1683	89
Sergeant to Chief Warrant Officer	77	4	64	3
Officer	192	9	151	8
Total Number of cases	**2045**	**100**	**1898**	**100**

** Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.*

Findings by Charge

	2007-2008		2008-2009	
	#	%	#	%
Guilty	2423	91.99	2159	90.87
Guilty – Special Finding	2	0.08	2	0.08
Guilty of included charges	2	0.08	4	0.18
Not guilty	159	6.04	164	6.90
Charge stayed	42	1.58	45	1.89
Charge not proceeded with	6	0.23	2	0.08
Total	**2634**	**100**	**2376**	**100**

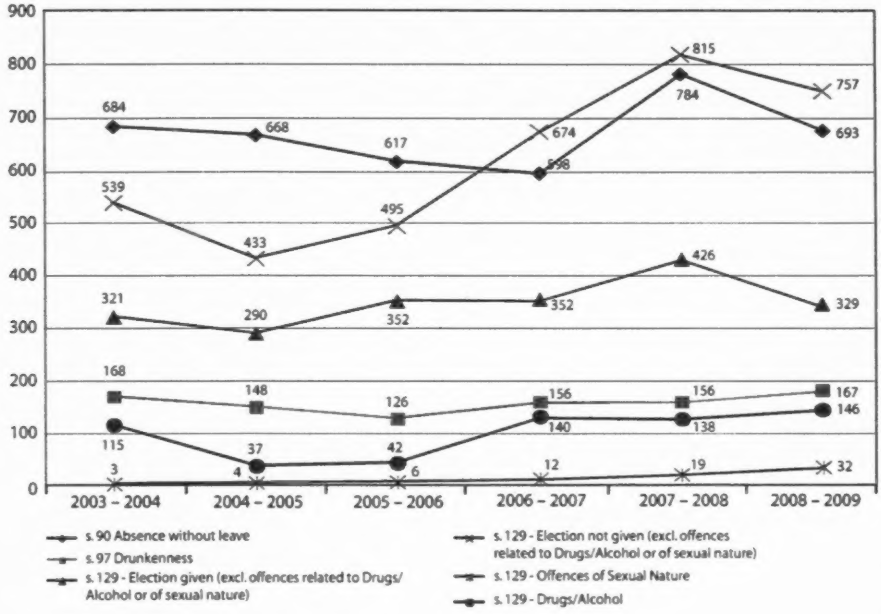
Summary of Charges

NDA Article	Description	2007-2008		2008-2009	
		#	%	#	%
83	Disobedience of lawful command	55	2.09	52	2.18
84	Striking or offering violence to a superior	4	0.15	2	0.08
85	Insubordinate behaviour	82	3.11	65	2.73
86	Quarrels and disturbances	36	1.37	39	1.64
87	Resisting or escaping from arrest or custody	2	0.08	0	0
90	Absence without leave	789	29.95	693	29.17
93	Cruel or disgraceful conduct	0	0	5	0.21
95	Abuse of subordinates	13	0.49	12	0.51
97	Drunkenness	156	5.92	167	7.03
101	Escape from custody	1	0.04	2	0.08
101.1	Failure to comply with conditions	5	0.19	0	0
106	Disobedience of captain's orders - ships	1	0.04	0	0
111	Improper driving of vehicles	7	0.27	4	0.17
112	Improper use of vehicles	13	0.49	10	0.42
114	Stealing	16	0.61	13	0.55
115	Receiving	2	0.08	1	0.04

ANNEX E

NDA Article	Description	2007-2008		2008-2009	
		#	%	#	%
116	Destruction, damage, loss or improper disposal	5	0.19	9	0.38
117	Miscellaneous offences	12	0.46	3	0.13
118	Contempt	0	0	1	0.04
124	Negligent performance of military duty	1	0.04	0	0
125	Offences in relation to documents	4	0.15	9	0.38
127	Injurious or destructive handling of dangerous substances	5	0.19	3	0.13
129	Conduct to the prejudice of good order and discipline – Offences of sexual nature	19	0.72	32	1.35
129	Conduct to the prejudice of good order and discipline – Drugs/Alcohol	138	5.24	146	6.14
129	Conduct to the prejudice of good order and discipline – election to be tried by CM given (excl. cases reported in 129 - Offences of sexual nature & 129 - Drugs/ Alcohol)	429	16.29	329	13.85
129	Conduct to the prejudice of good order and discipline – election to be tried by CM not given (excl. cases reported in 129 - Offences of sexual nature & 129 - Drugs/ Alcohol)	819	31.09	757	31.86
130	Service trial of civil offences	20	0.76	22	0.93
Total Number of charges		**2634**	**100**	**2376**	**100**

SUMMARY OF CHARGES YEAR TO YEAR COMPARISON



Authority

	2007-2008		2008-2009	
	#	%	#	%
Delegated Officer	**1564**	**77**	**1534**	**81**
Commanding Officer	**392**	**19**	**280**	**15**
Superior Commander	**89**	**4**	**84**	**4**
Total	**2045**	**100**	**1898**	**100**

Punishments

	2007-2008		2008-2009	
	#	%	#	%
Detention (suspended)	3	0.11	9	0.37
Detention	35	1.32	35	1.42
Reduction in rank	4	0.15	2	0.08
Severe reprimand	1	0.04	2	0.08
Reprimand	57	2.15	41	1.66
Fine	1620	61.11	1449	58.80
Confinement to ship or barracks	634	23.92	686	27.84
Extra work and drill	150	5.66	137	5.56
Stoppage of leave	86	3.24	43	1.75
Caution	61	2.30	60	2.44
Total	**2651**	**100**	**2464**	**100**

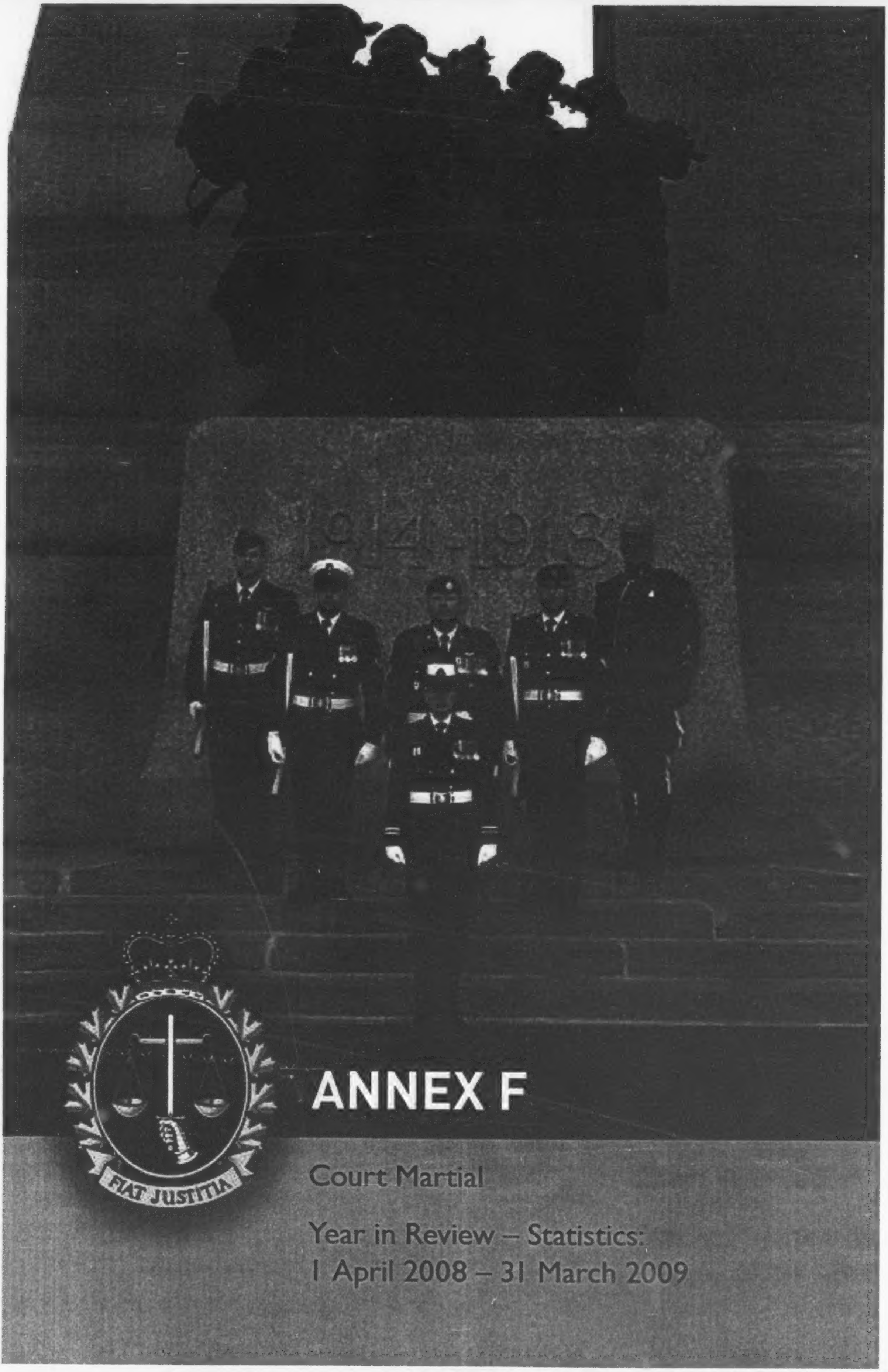
Note: More than one type of punishment may be awarded in a sentence.

Requests for Review

	2007-2008		2008-2009	
	#	%	#	%
Requests for review based on finding	6	19	11	39
Requests for review based on sentence	15	47	9	32
Requests for review based on finding & sentence	11	34	8	29
Total	**32**	**100**	**28**	**100**

Decisions of Review Authority

	2007-2008		2008-2009	
	#	%	#	%
Upholds decision	11	34	5	18
Quashes / substitutes findings	14	44	19	68
Substitutes punishment	7	22	3	10
Mitigates / commutes / remits punishment	0	0	1	4
Total	**32**	**100**	**28**	**100**



ANNEX F

Court Martial

Year in Review – Statistics:
1 April 2008 – 31 March 2009

Court Martial Reporting

Period 1 April 2008 – 31 March 2009

Courts Martial by Type

	2007-2008		2008-2009	
	#	%	#	%
Standing Court Martial	63	81	51	76
Disciplinary Court Martial***	15	19	10	15
General Court Martial	0	0	6	9
Total	**78***	**100**	**67****	**100**

* This figure comprises 1 joint trial, which tried 2 accused.

** This figure comprises 2 joint trials, which tried 4 accused.

***Bill C-60 came into force on 18 July 2008 reducing the types of courts martial from four to two. Therefore, the disciplinary and special courts martial were eliminated.

Summary of Charges

NDA Article	Description	2007-2008 #	2008-2009 #
74 (c)	Failed to use the utmost exertion to carry order into effect	1	0
75	Offences related to security	0	1
83	Disobedience of lawful command	11	13
84	Striking or offering violence to a superior officer	4	0
85	Insubordinate behaviour	6	1
86	Quarrels and disturbances	3	1
87(c)	Resisted an escort while being apprehended	1	0
87(d)	Broke out of barracks	1	0
90	Absent without leave	10	13
92	Scandalous conduct by officers	0	1
93	Cruel or disgraceful conduct	5	3

NDA Article	Description	2007-2008 #	2008-2009 #
95	Abuse of subordinates	5	1
97	Drunkenness	10	3
101.1	Failure to comply with conditions	1	0
111 (1)(c)	Improper driving of vehicle	1	0
112 (a)	Unauthorized use of a CF vehicle	1	3
114	Stealing	10	4
115	Receiving	0	1
116	Destruction, damage, loss or improper disposal	3	3

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

NDA Article	Description	2007-2008 #	2008-2009 #
117(b)	Improperly accepting compensation	5	0
117(f)	An act of a fraudulent nature	14	8
118	Contempt of service tribunal	0	1
118(2)(e)	Caused a disturbance at service tribunal	1	0
118.1	Failure to appear or attend	1	0
122	False answers or false information	0	2
124	Negligent performance of a military duty	0	12
125(a)	Wilfully (or negligently) made a false entry	43	16
125 (c)	With intent to deceive, alters a document required for an official purpose	0	5
127	Negligent handling of dangerous substance	0	3
129	An act to the prejudice of good order and discipline	16	12
129	Conduct to the prejudice of good order and discipline	24	16
129	Neglect to the prejudice of good order and discipline	1	7
130 (4(1) CDSA)*	Possession of substances	4	7
130 (5(1) CDSA)	Trafficking in substance	19	11
130 (5(2) CDSA)	Possession for purpose of trafficking	0	3
130 (80 (d) FAA)**	Wilfully signed a false certificate	5	0
130 (80(d) CC) ***	Dangerous handling of explosive substance	0	1

NDA Article	Description	2007-2008 #	2008-2009 #
130 (82(1) CC)	Possession without lawful excuse of an explosive substance	0	1
130 (86(1) CC)	Careless use of a firearm	2	2
130 (87 CC)	Pointing a firearm	1	0
130 (122 CC)	Breach of trust by public officer	0	3
130 (129 CC)	Offences relating to public or peace officer	0	1
130 (140(1) CC)	Public mischief	1	0
130 (153 CC)	Sexual exploitation	0	4
130 (163.1(4.1)) CC)	Accessing child pornography	3	0
130 (163.1(4) CC)	Possession of child pornography	9	0
130 (236 CC)	Manslaughter	0	1
130 (264.1 CC)	Uttering threats	0	3
130 (266 CC)	Assault	8	5
130 (267(a) CC)	Assault with a weapon	5	1
130 (267(b) CC)	Assault causing bodily harm	3	2
130 (270(1) CC)	Assaulting a peace officer	2	0
130 (271 CC)	Sexual assault	8	3
130 (362(1)(a) CC)	False pretences	2	0
130 (367 CC)	Forgery	14	3
130 (368 CC)	Uttering a forged document	11	3
130 (380(1) CC)	Fraud	13	1
130 (430 CC)	Mischief in relation to data	0	2
Total Offences		**288**	**187**

* Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].

** Financial Administrative Act, R.S.C., 1985, c. F-11 [FAA].

*** Criminal Code, R.S.C., 1985, c. C-46 [CC].

Disposition by Case

	2007-2008		2008-2009	
	#	%	#	%
Found/Plead Guilty to at least one charge	61	78	52	78
Not Guilty of all charges	12	16	9	13
Stay of Proceedings on all charges	3	4	1	1
Withdrawal of all charges at court martial	1	1	1	1
Other (Proceedings terminated)	1	1	4	6
Total	**78**	**100**	**67**	**100**

Sentences

Punishment Type	2007-2008	2008-2009
Dismissal	1	3
Imprisonment	10	7
Detention	7	2
Reduction in Rank	2	6
Forfeiture of Seniority	0	0
Severe Reprimand	16	16
Reprimand	18	15
Fine	44	40
Minor punishments: Caution	1	1
Total	**99**	**90**

Note : More than one type of punishment can be included in a sentence.

Language of Courts Martial

	2007-2008		2008-2009	
	#	%	#	%
English	71	91	53	79
French	7	9	14	21
Total	**78**	**100**	**67**	**100**

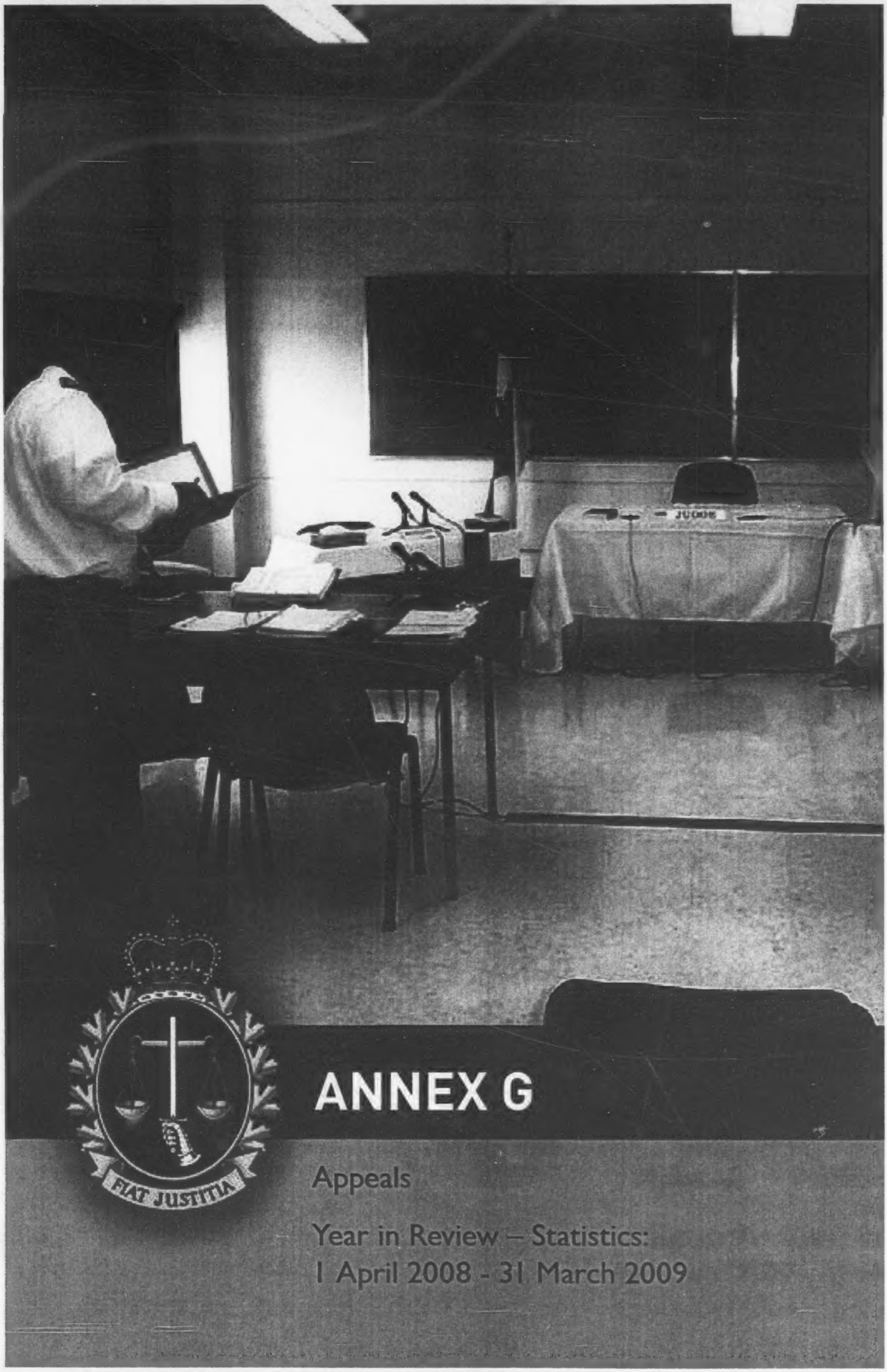
Courts Martial by Command

Command	2007-2008		2008-2009	
	#	%	#	%
Vice Chief of the Defence Staff (VCDS)	1	1	5	8
Associate Deputy Minister (Information Management) (ADM (IM))	0	0	3	4
Associate Deputy Minister (Finance and Corporate Services) (ADM (FIN CS))	2	3	0	0
Chief of the Maritime Staff (CMS)	14	18	11	16
Chief of the Land Staff (CLS)	38	49	32	48
Chief of the Air Staff (CAS)	9	12	6	9
Canadian Expeditionary Force Command (CEFCOM)	1	1	3	4
Canadian Operational Support Command (CANOSCOM)	1	1	0	0
Canadian Special Operations Forces Command (CANSOFCOM)	0	0	1	2
Chief of Military Personnel (CMP)	12	15	6	9
Total	**78**	**100**	**67**	**100**

Courts Martial by Rank

	2007-2008	2008-2009
Private and Corporal (includes Master-Corporal*)	48	42
Sergeant to Chief Warrant Officer	14	12
Officer	16	13
Total	**78**	**67**

*Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.



ANNEX G

Appeals

Year in Review – Statistics:
1 April 2008 - 31 March 2009

Appeals Reporting

Period 1 April 2008 - 31 March 2009

Appeals Heard

Court	2007–2008	2008–2009
Court Martial Appeal Court of Canada	7	9
Supreme Court of Canada	0	0
Total	**7**	**9**

Appeals by Party

Status of Appellant	2007–2008	2008–2009
Appeals by Crown	0	2
Appeals by Offender	7	7
Total	**7**	**9**

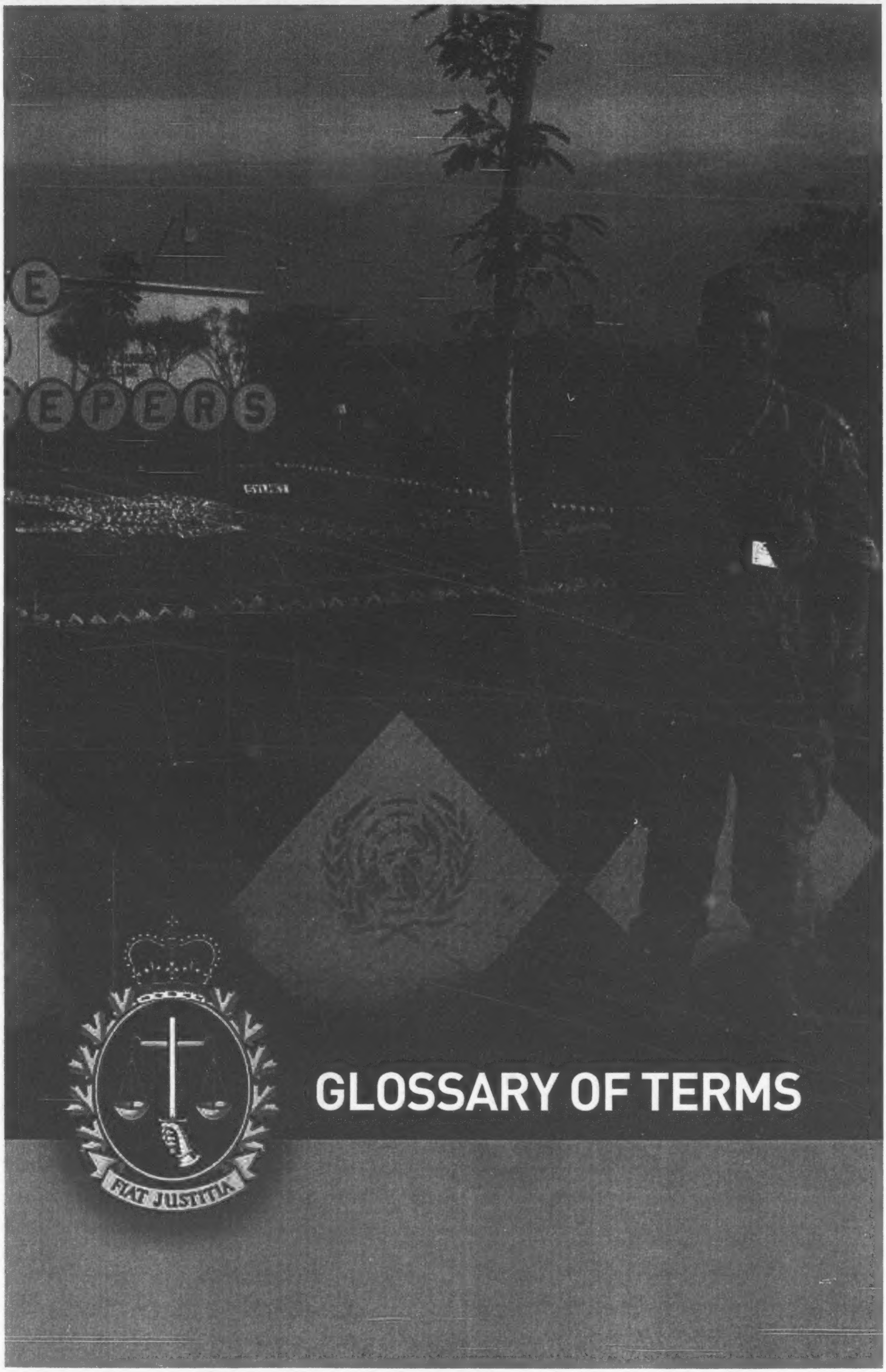
Nature of Appeal

Grounds	2007–2008	2008–2009
Finding	2	3
Sentence (severity and/or legality)	1	2
Finding and sentence	4	3
Constitutional issue	0	1
Total	**7**	**9**

Disposition

	2007–2008	2008–2009
Upheld trial decision	6	2
Stay of Proceedings	0	0
Overturned trial decision in whole or part	1	7
Total	**7**	**9**

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.



GLOSSARY OF TERMS

FIAT JUSTITIA

ADM (Fin CS)	Assistant Deputy Minister (Finance and Corporate Services)
ADM (IM)	Assistant Deputy Minister (Information Management)
ADM (Mat)	Assistant Deputy Minister (Materiel)
AJAG	Assistant Judge Advocate General
AMJC	Administration of Military Justice Committee
Canada COM	Canada Command
CANFORGEN	Canadian Forces General message
CANOSCOM	Canadian Operational Support Command
CANSOFCOM	Canadian Special Operations Forces Command
Capt	Captain
CAS	Chief of the Air Staff
CCC	*Criminal Code of Canada*
CDS	Chief of the Defence Staff
CDSA	*Controlled Drugs and Substances Act*
CEFCOM	Canadian Expeditionary Force Command
CF	Canadian Forces
CFMLC	Canadian Forces Military Law Centre
CFNIS	Canadian Forces National Investigation Service
CFPM	Canadian Forces Provost Marshall
Charter	*Canadian Charter of Rights and Freedoms*
CIMP	Comprehensive Information Management Program
CJ CMAC	Chief Justice Court Martial Appeal Court of Canada
CLS	Chief of the Land Staff
CMA	Court Martial Administrator
CMAC	Court Martial Appeal Court of Canada
CMJ	Chief Military Judge
CMP	Chief of Military Personnel
CMPS	Canadian Military Prosecution Service
CMRS	Court Martial Reporting System
CMS	Chief of the Maritime Staff
CO	Commanding Officer

Cpl	Corporal
CPO1	Chief Petty Officer 1st Class
CSD	Code of Service Discipline
CWO	Chief Warrant Officer
DCS	Defence Counsel Services
DCM	Disciplinary Courts Martial
DDCS	Director of Defence Counsel Services
DDMP	Deputy Director of Military Prosecutions
DIN	Defence Information Network
DI&OL	Directorate of International Operational Law
DJA	Deputy Judge Advocate
DJAG	Deputy Judge Advocate General
DJAG/COS	Deputy Judge Advocate General/Chief of Staff
DJAG/MJ&AL	Deputy Judge Advocate General/Military Justice and Administrative Law
DJAG/Ops	Deputy Judge Advocate General/Operations
DJAG/Reg Svcs	Deputy Judge Advocate General/Regional Services
DLAW/Admin Law	Directorate of Law/Administrative Law
DLAW/CBP&E	Directorate of Law/Compensation, Benefits, Pensions and Estates
DLAW/I&IO	Directorate of Law/Intelligence and Information Operations
DLAW/MIL PER	Directorate of Law/Military Personnel
DLAW/MJP&R	Directorate of Law/Military Justice Policy and Research
DMP	Director of Military Prosecutions
DMPORA	Director Military Personnel Operational Research and Analysis
DND	Department of National Defence
DND/CF LA	Department of National Defence/ Canadian Forces Legal Advisor
DSLA	Directorate of Strategic Legal Analysis
Ex-Cpl	Ex-Corporal
FOB	Forward Operating Base
GCM	General Court Martial
JAG	Judge Advocate General
LOBT	Legal Officer Basic Training

LOIT	Legal Officer Intermediate Training
MCpl	Master Corporal
MS	Master Seaman
MJCC	Military Judges Compensation Committee
MND	Minister of National Defence
NCM	Non-Commissioned member
NDA	*National Defence Act*
NDHQ	National Defence Headquarters
OCdt.	Officer Cadet
OPME	Officer Professional Military Education
PO1	Petty Officer First Class
POCT	Presiding Officer Certification Training
PORT	Presiding Officer Re-certification Training
QR&O	Queen's Regulations and Orders for the Canadian Forces
RDP	Record of Disciplinary Proceedings
RMC	Royal Military College
RMP	Regional Military Prosecutor
SCC	Supreme Court of Canada
SCM	Standing Courts Martial
Sgt	Sergeant
SJS LA	Strategic Joint Staff Legal Advisor
SOIRA	*Sex Offender Information Registration Act*
TFSO	Task Force Standing Orders
VCDS	Vice Chief of the Defence Staff